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Commercial Practices

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PARTS 0 TO 149

Revised as of January 1, 1986

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Commercial Practices

16

PARTS 0 TO 149

Revised as of January 1, 1986

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thus: **16 CFR 0.1**

Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

ISSUE DATES

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16	as of January 1
Title 17 through Title 27	as of April 1
Title 28 through Title 41	as of July 1
Title 42 through Title 50	as of October 1

The appropriate revision date is printed on the cover of each volume.

LEGAL STATUS

The contents of the Federal Register are required to be judicially noticed (44 U.S.C. 1507). The Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510).

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The Paperwork Reduction Act of 1980 (Pub. L. 96-511) requires Federal agencies to display an OMB control number with their information collection request. Many agencies have begun publishing numerous OMB control numbers as amendments to existing regulations in the CFR. These OMB numbers are placed as close as possible to the applicable recordkeeping or reporting requirements.

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An index to the text of "Title 3—The President" is carried within that volume.

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For a summary, legal interpretation, or other explanation of any regulation in this volume, contact the issuing agency. Inquiries concerning editing procedures and reference assistance with respect to the Code of Federal Regulations may be addressed to the Director, Office of the Federal Register, National Archives and Records Administration, Washington, D.C. 20408 (telephone 202-523-3517). Sales are handled exclusively by the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402 (telephone 202-783-3238).

JOHN E. BYRNE,
Director,
Office of the Federal Register.

January 2, 1986.

THIS TITLE

Title 16—COMMERCIAL PRACTICES is composed of three volumes. The first two volumes containing Parts 0-149, and Parts 150-999, comprise Chapter I—Federal Trade Commission. The third volume including Part 1000 to End contains Chapter II—Consumer Product Safety Commission. The first volume containing Parts 0-149 has a Redesignation Table. The contents of these volumes represent all current regulations codified under this title of the CFR as of January 1, 1986.

For this volume, LaJuana D. Caldwell was Chief Editor. The Code of Federal Regulations publication program is under the direction of Martha B. Girard, assisted by Robert E. Jordan.

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VIII

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AUTHORITY: Sec. 6(g), 38 Stat. 721 (15 U.S.C. 46); 80 Stat. 383, as amended (5 U.S.C. 552).

SOURCE: 41 FR 54483, Dec. 14, 1976, unless otherwise noted.

§ 0.1 The Commission.

The Federal Trade Commission is an independent administrative agency which was organized in 1915 pursuant to the Federal Trade Commission Act of 1914 (38 Stat. 717, as amended; 15 U.S.C. 41-58). It is responsible for the administration of a variety of statutes which, in general, are designed to promote competition and to protect the public from unfair and deceptive acts and practices in the advertising and marketing of goods and services. It is composed of five members appointed by the President and confirmed by the Senate for terms of seven years.

§ 0.2 Official address.

The principal office of the Commission is at Washington, D.C. All communications to the Commission should be addressed to the Federal Trade Commission, Pennsylvania Avenue and Sixth Street, NW., Washington, D.C. 20580, unless otherwise specifically directed.

§ 0.3 Hours.

Principal and field offices are open on each business day from 8:30 a.m. to 5 p.m.

§ 0.4 Laws administered.

The Commission exercises enforcement and administrative authority under the Federal Trade Commission Act (38 Stat. 717, as amended (15 U.S.C. 41-58)), the Clayton Act (38 Stat 730, as amended (15 U.S.C. 12-27)), the Export Trade Act (40 Stat. 516, as amended (15 U.S.C. 61-65)), the Packers and Stockyards Act (42 Stat. 159, as amended (7 U.S.C. 181-229)), the Wool Products Labeling Act (54 Stat. 1128, as amended (15 U.S.C. 68-68j)), the Trade Mark Act (60 Stat. 427, as amended (15 U.S.C. 1051-72)), The Fur Products Labeling Act (65 Stat. 175, as amended (15 U.S.C. 69-69j)), the Textile Fiber Products Identification Act (72 Stat. 1717, as amended (15 U.S.C. 70-70k)), the Federal Cigarette Labeling and Advertising Act (79 Stat. 282, as amended (15 U.S.C. 1331-39)), the Fair Packaging and Labeling Act (80 Stat. 1296, as amended (15 U.S.C. 1451-61)), the Truth in Lending Act (82 Stat. 146, as amended (15 U.S.C. 1601 et seq.)), the Fair Credit Reporting Act (84 Stat. 1128 (15 U.S.C. 1681 et seq.)), the Fair Credit Billing Act (88 Stat. 1511; (15 U.S.C. 1666)), the Equal Credit Opportunity Act (88 Stat. 1521, as amended (15 U.S.C. 1691)), Hobby Protection Act (87 Stat. 686 (15 U.S.C. 2101)), the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (88 Stat. 2183 (15 U.S.C. 2301-12, 45-58)), the Energy Policy and Conservation Act (89 Stat. 871 (42 U.S.C. 6291)), the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (90 Stat. 1383 (15 U.S.C. 1311)), and other Federal statutes.

§ 0.5 Laws authorizing monetary claims.

The Commission is authorized to entertain monetary claims against it under two statutes. The Federal Tort Claims Act (28 U.S.C. 2671-2680) provides that the United States shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful acts or omissions of its employees acting within the scope of their employment or office. The Military Personnel and Civilian Employees Claims Act of 1964 (31 U.S.C. 3701, 3721) authorizes the Commission to compensate employees' claims for damage to or loss of personal property incident to their service. The Commission's claims officer for both statutes is Teresa A. Hennessy, telephone (202) 523-3533.

(Sec. 6(g) 38 Stat. 721 (15 U.S.C. 46); 80 Stat. 383, as amended (5 U.S.C. 552))

[50 FR 16699, Apr. 29, 1985]

§ 0.6 [Reserved]

§ 0.7 Delegation of functions.

The Commission, under the authority provided by Reorganization Plan No. 4 of 1961, may delegate, by published order or rule, certain of its functions to a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board.

§ 0.8 The Chairman.

The Chairman of the Commission is designated by the President, and, subject to the general policies of the Commission, is the executive and administrative head of the agency. He presides at meetings of and hearings before the Commission and participates with other Commissioners in all Commission decisions. Attached to the Office of the Chairman, and reporting directly to him, and through him to the Commission, are the following staff units: (a) The Office of Public Affairs, which furnishes information concerning Commission activities to news media and the public; and (b) the Office of Congressional Relations, which coordinates all liaison activities with Congress.

[50 FR 53303, Dec. 31, 1985]

§ 0.9 Organization structure.

The Federal Trade Commission comprises the following principal units:

Office of the Executive Director
Office of the General Counsel
Office of the Secretary
Office of Administrative Law Judges
Office of Presiding Officers
Bureau of Competition
Bureau of Consumer Protection
Bureau of Economics
The Regional Offices

[45 FR 36340, May 29, 1980; 45 FR 39244, June 10, 1980; 50 FR 53303, Dec. 31, 1985]

§ 0.10 Office of the Executive Director.

(a) The Executive Director, under the direction of the Chairman, is the chief operating official. He exercises executive and administrative supervision over all the offices, bureaus, and staff of the Commission and resolves problems concerning priorities in case handling. Immediately under his direction are the Deputy Executive Directors for Management and Planning and Information.

(b) The Deputy Executive Director for Management functions as staff advisor to the Executive Director in all aspects of administrative management; provides administrative policy guidance to agency management and provides general supervision to the programs of procurement and contracts, personnel, budget and finance, and administrative service activities; and initiates and develops long-range plans to assure that the Commission acquires and effectively utilizes the manpower, financial resources, physical facilities and management tools necessary to accomplish its mission.

(c) The Deputy Executive Director for Planning and Information provides general supervision to the programs of data processing and information systems, information analysis, and the library; responds to initial requests for Commission records under the Freedom of Information and Privacy Acts; maintains a current index of opinions, orders, statements of policy and interpretations, staff manuals and instructions that affect any member of the public, and other public records of the Commission; makes available for inspection and copying all public records of the Commission; coordinates the Commission's information processing systems; and is responsible for the publication of all Commission actions which must appear in the FEDERAL REGISTER and for the publication of

Federal Trade Commission Decisions and *Court Decisions—Federal Trade Commission.*

[48 FR 4280, Jan. 31, 1983, as amended at 50 FR 53303, Dec. 31, 1985]

§ 0.11 Office of the General Counsel.

The General Counsel is the Commission's chief law officer and adviser, who renders necessary legal services to the Commission, represents the Commission in the Federal and State Courts, advises the Commission with respect to questions of law and policy, including advice with respect to legislative matters, cooperates with and assists State and local officials in the efforts to eliminate local and national trade restraints.

[41 FR 54483, Dec. 14, 1976, as amended at 50 FR 53303, Dec. 31, 1985]

§ 0.12 Office of the Secretary.

The Secretary is responsible for the minutes of Commission meetings and is the legal custodian of the Commission's seal, property, papers, and records, including legal and public records. The Secretary, or in his absence an Acting Secretary designated by the Commission, signs Commission orders and official correspondence.

[48 FR 4280, Jan. 31, 1983]

§ 0.13 [Reserved]

§ 0.14 Office of Administrative Law Judges.

Administrative law judges are officials to whom the Commission, in accordance with law, delegates the initial performance of its adjudicative fact-finding functions to be exercised in conformity with Commission decisions and policy directives and with its rules of practice. Administrative law judges are appointed under the authority and subject to the prior approval of the Office of Personnel Management.

[41 FR 54483, Dec. 14, 1976, as amended at 46 FR 26287, May 12, 1981]

§ 0.15 Office of Presiding Officers.

Presiding Officers are employees assigned to conduct rulemaking proceedings under section 18(a)(1)(B) of the Federal Trade Commission Act as amended and other rulemaking proceedings as directed.

[45 FR 36340, May 29, 1980]

§ 0.16 Bureau of Competition.

The bureau is responsible for enforcing Federal antitrust and trade regulation laws under section 5 of the Federal Trade Commission Act, the Clayton Act, and a number of other special statutes which the Commission is charged with enforcing. The bureau work aims to preserve the free market system and assure the unfettered operation of the forces of supply and demand. Its activities seek to ensure price competition, quality products and services and efficient operation of the national economy. The bureau carries out its responsibilities by investigating alleged law violations, and recommending to the Commission such further action as may be appropriate. Such action may include injunctive relief in Federal District Court, complaint and litigation before the agency's administrative law judges, formal nonadjudicative settlement of complaints, trade regulation rules, or reports. The bureau also conducts compliance investigations and initiates proceedings for civil penalties to assure compliance with final Commission orders dealing with competition and trade restraint matters.

[41 FR 54483, Dec. 14, 1976. Redesignated at 45 FR 36341, May 29, 1980; 50 FR 53303, Dec. 31, 1985]

§ 0.17 Bureau of Consumer Protection.

The Bureau investigates unfair or deceptive acts or practices under section 5 of the Federal Trade Commission Act as well as potential violations of numerous special statutes which the Commission is charged with enforcing. It prosecutes before the agency's administrative law judges alleged violations of law after issuance of a complaint by the Commission or obtains through negotiation consented-to orders, which must be accepted and issued by the Commission. The bureau participates in trade regulation rulemaking proceedings under section 18(a)(1)(B) of the Federal Trade Commission Act and other rulemaking proceedings under other statutory authority. It investigates compliance with final orders and trade regulation rules and seeks civil penalties or consumer redress for their violation. In addition, the bureau seeks to educate both consumers and the business community about the laws it enforces.

[46 FR 26287, May 12, 1981]

§ 0.18 Bureau of Economics.

The bureau aids and advises the Commission concerning the economic aspects of all of its functions, and is responsible for the preparation of various economic reports and surveys. The bureau provides economic and statistical assistance to the enforcement bureaus in the investigation and trial of cases.

[41 FR 54483, Dec. 14, 1976. Redesignated at 45 FR 36341, May 29, 1980; 50 FR 53303, Dec. 31, 1985]

§ 0.19 The Regional Offices.

(a) These offices are investigatory arms of the Commission, and, with respect to matters of a regional nature, have responsibility for investigational, trial, compliance, and consumer educational activities as delegated by the Commission. Each regional office has general responsibility for its own activities and for the smaller offices, designated as field stations, located in its area of responsibility. They are under the general supervision of the Office of the Executive Director, and clear their activities through the appropriate operating bureaus.

(b) The addresses of the respective regional offices, and of the field stations located in the area of each are as follows:

(1) *Atlanta Regional Office.* Federal Trade Commission, Room 1000, 1718 Peachtree Street, NW., Atlanta, GA 30309.

(2) *Boston Regional Office.* Federal Trade Commission, Room 1301, 150 Causeway Street, Boston, MA 02114.

(3) *Chicago Regional Office.* Federal Trade Commission, Suite 1437, 55 East Monroe Street, Chicago, IL 60603.

(4) *Cleveland Regional Office.* Federal Trade Commission, Suite 500, Mall Building, 118 Saint Clair Avenue N.E., Cleveland, OH 44114.

(5) *Dallas Regional Office.* Federal Trade Commission, 8303 Elmbrook Drive, Dallas, TX 75247.

(6) *Denver Regional Office.* Federal Trade Commission, Suite 2900, 1405 Curtis Street, Denver, CO 80202.

(7) *Los Angeles Regional Office.* Federal Trade Commission, Room 13209, Federal Building, 11000 Wilshire Boulevard, Los Angeles, CA 90024.

(8) *New York Regional Office.* Federal Trade Commission, 2243-EB, Federal Building, 26 Federal Plaza, New York, NY 10278.

(9) *San Francisco Regional Office.* Federal Trade Commission, 450 Golden Gate Avenue, Box 36005, San Francisco, CA 94102. Field Station: Federal Trade Commission, Room 6324, 300 Ala Moana, Honolulu, HI 96850.

(10) *Seattle Regional Office.* Federal Trade Commission, 28th Floor, Federal Building, 915 Second Avenue, Seattle, WA 98174.

(c) Each of the regional offices is supervised by a Regional Director, who is available for conferences with attorneys, consumers, and other members of the public on matters relating to the Commission's activities.

[41 FR 54483, Dec. 14, 1976, as amended at 42 FR 27218, May 27, 1977; 43 FR 754, Jan. 4, 1978; 43 FR 6579, Feb. 15, 1978. Redesignated at 45 FR 36341, May 29, 1980; 50 FR 53303, Dec. 31, 1985]

PART 1—GENERAL PROCEDURES

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AUTHORITY: Sec. 6, 38 Stat. 721 (15 U.S.C. 46), unless otherwise noted.

SOURCE: 32 FR 8444, June 13, 1967, unless otherwise noted.

NOTE: On May 14, 1973, the responsibilities of the Federal Trade Commission for enforcement of the Flammable Fabrics Act, as amended, were transferred to the Consumer Product Safety Commission. The CPSC Flammable Fabrics Act regulations are in 16 CFR Chapter II, Subchapter D.

Subpart A—Industry Guidance

ADVISORY OPINIONS

§ 1.1 Policy.

(a) Any person, partnership, or corporation may request advice from the Commission with respect to a course of action which the requesting party proposes to pursue. The Commission will consider such requests for advice and inform the requesting party of the Commission's views, where practicable, under the following circumstances.

(1) The matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent;

(2) A proposed corporate merger or acqusition is involved; or

(3) The subject matter of the request and consequent publication of Commission advice is of significant public interest.

(b) The Commission has authorized its staff to consider all requests for advice and to render advice, where practicable, in those circumstances in which a Commission opinion would not be warranted. Hypothetical questions will not be answered, and a request for advice will ordinarily be considered inappropriate where: (1) The same or substantially the same course of action is under investigation or is or has been the subject of a current proceeding involving the Commission or another governmental agency, or (2) an informed opinion cannot be made or could be made only after extensive investigation, clinical study, testing, or collateral inquiry.

[44 FR 21624, Apr. 11, 1979; 44 FR 23515, Apr. 20, 1979]

§ 1.2 Procedure.

(a) Application. The request for advice or interpretation should be submitted in writing (one original and two copies) to the Secretary of the Commission and should: (1) State clearly the question(s) that the applicant wishes resolved; (2) cite the provision of law under which the question arises; and (3) state all facts which the applicant believes to be material. In addition, the identity of the companies and other persons involved should be disclosed. Letters relating to unnamed companies or persons may not be answered. Submittal of additional facts may be requested prior to the rendering of any advice.

(b) Compliance matters. If the request is for advice as to whether the proposed course of action may violate an outstanding order to cease and desist issued by the Commission, such request will be considered as provided for in § 2.41 of this chapter.

[44 FR 21624, Apr. 11, 1979, as amended at 44 FR 40638, July 12, 1979]

§ 1.3 Advice.

(a) On the basis of the materials submitted, as well as any other information available, and if practicable, the Commission or its staff will inform the requesting party of its views.

(b) Any advice given by the Commission is without prejudice to the right of the Commission to reconsider the questions involved and, where the public interest requires, to rescind or revoke the action. Notice of such rescission or revocation will be given to the requesting party so that he may discontinue the course of action taken pursuant to the Commission's advice. The Commission will not proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice under this section, where all the relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval.

(c) Advice rendered by the staff is without prejudice to the right of the Commission later to rescind the advice and, where appropriate, to commence an enforcement proceeding.

[44 FR 21624, Apr. 11, 1979]

§ 1.4 Public disclosure.

Written advice rendered pursuant to this Section and requests therefor, including names and details, will be placed in the Commission's public record immediately after the requesting party has received the advice, subject to any limitations on public disclosure arising from statutory restrictions, the Commission's rules, and the public interest. A request for confidential treatment of information submitted in connection with the questions should be made separately.

[44 FR 21624, Apr. 11, 1979]

INDUSTRY GUIDES

§ 1.5 Purpose.

Industry guides are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. They provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry. Failure to comply with the guides may result in corrective action by the Commission under applicable statutory provisions. Guides may relate to a practice common to many industries or to specific practices of a particular industry.

§ 1.6 How promulgated.

Industry guides[1] are promulgated by the Commission on its own initiative or pursuant to petition filed with the Secretary or upon informal application therefor, by any interested person or group, when it appears to the Commission that guidance as to the legal requirements applicable to particular practices would be beneficial in the public interest and would serve to bring about more widespread and equitable observance of laws administered by the Commission. In connection with the promulgation of industry guides, the Commission at any time may conduct such investigations, make such studies, and hold such conferences or hearings as it may deem appropriate. All or any part of any such investigation, study, conference, or hearing may be conducted under the provisions of Subpart A of Part 2 of this chapter.

Subpart B—Rules and Rulemaking Under Section 18(a)(1)(B) of the FTC Act

AUTHORITY: Sec. 6, 38 Stat. 721 (15 U.S.C. 46); sec. 18(a)(1)(B), 88 Stat. 2193 (15 U.S.C. 57a); sec. 552, 80 Stat. 378 (5 U.S.C. 552).

SOURCE: Sections 1.7 to 1.11 appear at 46 FR 26288, May 12, 1981, unless otherwise noted.

Sections 1.12 to 1.20 appear at 40 FR 33966, Aug. 13, 1975, unless otherwise noted.

§ 1.7 Scope of rules in this subpart.

The rules in this subpart apply to and govern proceedings for the promulgation of rules as provided in section 18(a)(1)(B) of the Federal Trade Commission Act. Such rules shall be known as trade regulation rules. All other rulemaking proceedings shall be governed by the rules in Subpart C, except as otherwise required by law or as otherwise specified in this chapter.

[46 FR 26288, May, 12, 1981, as amended at 50 FR 53303, Dec. 31, 1985]

§ 1.8 Nature, authority and use of trade regulation rules.

(a) For the purpose of carrying out the provisions of the Federal Trade Commission Act, the Commission is empowered to promulgate trade regulation rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce. Such rules may include requirements prescribed for the purpose of preventing such acts or practices. A violation of a rule shall constitute an unfair or deceptive act or practice in violation of section 5(a)(1) of that Act, unless the Commission otherwise expressly provides in its rule. However, the respondent in an adjudicative proceeding may show that his conduct does not violate the rule or assert any other defense to which he is legally entitled.

(b) The Commission at any time may conduct such investigations, make such studies and hold such conferences as it may deem necessary. All or any part of any such investigation may be conducted under the provisions of Subpart A of Part 2 of this chapter.

§ 1.9 Petitions to commence trade regulation rule proceedings.

Trade regulation rule proceedings may be commenced by the Commission upon its own initiative or pursuant to written petition filed with the Secretary by any interested person stating reasonable grounds therefor. If the Commission determines to commence a trade regulation rule proceeding pursuant to the petition, the petitioner shall be mailed a copy of the public notices issued under §§ 1.10, 1.11 and 1.12. Any person whose petition is not deemed by the Commission sufficient to warrant commencement of a rulemaking proceeding shall be notified of that determination and may be given an opportunity to submit additional data.

[46 FR 26288, May, 12, 1981, as amended at 50 FR 53303, Dec. 31, 1985]

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[1] In the past, certain of these have been promulgated and referred to as trade practice rules.

§ 1.10 Advance notice of proposed rulemaking.

(a) Prior to the commencement of any trade regulation rule proceeding, the Commission shall publish in the Federal Register an advance notice of such proposed proceeding.

(b) The advance notice shall: (1) Contain a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission; and (2) invite the response of interested persons with respect to such proposed rulemaking, including any suggestions or alternative methods for achieving such objectives.

(c) The advance notice shall be submitted to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Interstate and Foreign Commerce of the House of Representatives.

(d) The Commission may, in addition to publication of the advance notice, use such additional mechanisms as it considers useful to obtain suggestions regarding the content of the area of inquiry before publication of an initial notice of proposed rulemaking pursuant to § 1.11.

[46 FR 26288, May 12, 1981, as amended at 50 FR 53303, Dec. 31, 1985]

§ 1.11 Commencement of a rulemaking proceeding.

(a) *Initial notice.* A trade regulation rule proceeding shall commence with an initial notice of proposed rulemaking. Such notice shall be published in the Federal Register not sooner than 30 days after it has been submitted to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Interstate and Foreign Commerce of the House of Representatives. The initial notice shall include:

(1) The text of the proposed rule including any alternatives which the Commission proposes to promulgate; (2) reference to the legal authority under which the rule is proposed; (3) a statement describing with particularity the reason for the proposed rule; (4) an invitation to all interested persons to propose issues which meet the criteria of § 1.13(d)(1)(i) for consideration in accordance with § 1.13(d)(5) and (d)(6); (5) an invitation to all interested persons to comment on the proposed rule; and (6) a statement of the manner in which the public may obtain copies of the preliminary regulatory analysis.

(b) *Preliminary regulatory analysis.* Except as otherwise provided by statute, the Commission shall, when commencing a rulemaking proceeding, issue a preliminary regulatory analysis which shall contain:

(1) A concise statement of the need for, and the objectives of, the proposed rule;

(2) A description of any reasonable alternatives to the proposed rule which may accomplish the stated objective of the rule in a manner consistent with applicable law;

(3) For the proposed rule, and for each of the alternatives described in the analysis, a preliminary analysis of the projected benefits and any adverse economic effects and any other effects, and of the effectiveness of the proposed rule and each alternative in meeting the stated objectives of the proposed rule; and

(4) The information required by the Regulatory Flexibility Act at 5 U.S.C. 603.

[46 FR 26288, May 12, 1981, as amended at 50 FR 53303, Dec. 31, 1985]

§ 1.12 Final notice.

A final notice of proposed rulemaking shall be published in the Federal Register and, to the extent practicable, otherwise made available to interested persons. The final notice shall include: (a) Designated issues, unless there are none, which are to be considered in accordance with § 1.13(d)(5) and (d)(6); (b) the time and place of an informal hearing; (c) instructions to interested persons seeking to make oral presentations; (d) a requirement that interested persons who desire to avail themselves of the procedures of § 1.13(d)(5) and (d)(6) with respect to any issue designated in paragraph (a) of this section must identify their interests with respect to those issues in such manner as may be established by the presiding officer; and (e) an incorporation by reference of the contents of the initial notice.

[40 FR 33966, Aug. 13, 1975, as amended at 50 FR 53303, Dec. 31, 1985]

§ 1.13 Rulemaking proceeding.

(a) *Written comments.* After commencement of a trade regulation rule proceeding, the Commission shall accept written submissions of data, views, and arguments on all issues of fact, law, and policy. The initial notice shall specify the deadline for filing written comments under this subsection.

(b) *Comments proposing issues subject to the procedures of § 1.13(d)(5) and (d)(6).* Interested persons may propose issues for consideration in accordance with § 1.13(d)(5) and (d)(6) until thirty (30) days after the close of the written comment period or such other period as the Commission may establish in the initial notice.

(c) *Presiding officer—*(1) *Assignment.* Upon commencement of a proposed trade regulation rule proceeding, a presiding officer shall be appointed by the Chief Presiding Officer or, when the Commission or one or more of its members serves as presiding officer, by the Commission.

(2) *Powers of the presiding officer.* The presiding officer shall be responsible for the orderly conduct of the rulemaking proceeding and the maintenance of the rulemaking and public records until the close of the postrecord comment period. He shall have all powers necessary to that end including the following: (i) To publish a final notice in accordance with § 1.12 or issue any other public notice that may be necessary for the orderly conduct of the rulemaking proceeding; (ii) to designate or modify, issues for consideration in accordance with § 1.13(d)(5) and (d)(6); (iii) to set the time and place of the informal hearing and to change any time periods prescribed in this subpart; (iv) to prescribe rules or issue rulings to avoid unnecessary costs or delay. Such rules or rulings may include, but are not limited to, the imposition of reasonable time limits on each person's oral presentation; and requirements that any examination; including cross-examination, which a person may be entitled to conduct or have conducted be conducted by the presiding officer on behalf of that person in such a manner as the presiding officer determines to be appropriate and to be required for a full and true disclosure with respect to any issue designated for consideration in accordance with § 1.13 (d)(5) and (d)(6); (v) to make rules and rulings limiting the representation of interested persons for the purpose of examination, including cross-examination, and governing the manner in which such examination is limited, including the selection of a representative from among a group of persons with the same or similar interests; (vi) to require that oral presentations at the informal hearing or responses to written questions be under oath; (vii) to require that oral presentations at the informal hearing be submitted in writing in advance of presentation; (viii) to certify questions to the Commission for its determination; and (ix) to rule upon all motions or petitions of interested persons, which motions or petitions must be filed with the presiding officer until the close of the postrecord comment period.

(3) *Review of rulings by the presiding officer—*(i) *Review after certification by the presiding officer.* Except as otherwise provided in paragraph (c)(3)(ii) of this section, applications for review of a ruling will not be entertained by the Commission prior to its review of the record pursuant to § 1.14, unless the presiding officer certifies in writing to the Commission that a ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate review of the ruling may materially advance the ultimate termination of the proceeding or subsequent review will be an inadequate remedy. Within five (5) days after a ruling by the presiding officer, any interested person may petition the presiding officer for certification of that ruling to the Commission. Certification of a ruling shall not stay the rulemaking proceeding unless the presiding officer or the Commission shall so order. Submissions to the Commission not to exceed fifteen (15) pages may be made within ten (10) days of the presiding officer's

certification. All such filings shall be a part of the rulemaking record. The Commission may thereupon, in its discretion, permit the appeal. Commission review, if permitted, will be based on the application for review and any additional submissions, without oral argument or further briefs, unless otherwise ordered by the Commission.

(ii) *Review without certification by the presiding officer.* Within ten (10) days after publication of the final notice, any interested person may petition the Commission for addition, modification or deletion of a designated issue, accompanied by a filing not to exceed fifteen (15) pages. Additional submissions on the issue by other interested persons, not to exceed fifteen (15) pages, may be made within twenty (20) days of the publication of the final notice. The Commission may thereupon, in its discretion, permit the appeal. Commission review, if permitted, will be based on the petition and any additional submissions, without oral argument or further briefs, unless otherwise ordered by the Commission. A petition hereunder shall not stay the rulemaking proceeding unless the presiding officer or the Commission shall so order. All petitions filed under this paragraph shall be a part of the rulemaking record. Notice of the filing of any such petition may be obtained from the Office of the Secretary of the Commission. In the event any designated issue is added or substantially modified by the Commission, interested persons shall be given a further opportunity to identify their interests with respect to those issues.

(4) *Substitution of presiding officer.* In the event of the substitution of a new presiding officer for the one originally appointed, any motion predicated upon such substitution shall be made within five (5) days thereafter.

(5) *Organization.* In the performance of their rulemaking functions, presiding officers shall be responsible to the chief presiding officer who shall not be responsible to any other officer or employee of the Commission, *provided, however,* that periodic evaluations of the performance of presiding officers may be conducted by the Commission through the Office of the Executive Director.

(6) *Ex parte communications.* Except as required for the disposition of *ex parte* matters as authorized by law, no presiding officer shall consult any person or party with respect to any fact in issue unless such officer gives notice and opportunity for all parties to participate.

(d) *Informal hearings.* An informal hearing with the opportunity for oral presentations on all issues shall be conducted by the presiding officer. In addition, if an issue is designated pursuant to these rules for consideration in accordance with § 1.13(d) (5) and (6), the informal hearing on such issues shall be conducted in accordance with those paragraphs. For all other issues the presiding officer may in his discretion employ, in whole or in part, the procedures of those paragraphs.

(1) *Nature of issues for consideration in accordance with § 1.13* (d)(5) *and (d)(6)—*(i) *Issues that must be considered in accordance with § 1.13(d)(5) and (d)(6).* The only issues that must be designated for consideration in accordance with paragraphs (d)(5) and (d)(6) of this section are disputed issues of fact that are determined by the Commission or the presiding officer to be material and necessary to resolve.

(ii) *Issues that may be considered in accordance with § 1.13(d)(5) and (d)((6).* The Commission and the presiding officer retain the power to designate any other issues for consideration in accordance with paragraphs (d)(5) and (d)(6) of this section.

(2) *Addition or Modification of issues for consideration in accordance with § 1.13(d)(5) and (d)(6).* The presiding officer may at any time on his own motion or pursuant to a written petition by interested persons, add or modify any issues designated pursuant to § 1.12(a). No such petition shall be considered unless good cause is shown why any such proposed issue was not proposed pursuant to § 1.13(b).

(3) *Identification of interests.* Not later than twenty (20) days after publication of the final notice each interested person who desires to avail himself of the procedures of paragraphs (d)(5) and (d)(6) of this section shall notify the presiding officer in writing

of his particular interest with respect to each issue designated for consideration in accordance with those subsections. In the event that new issues are designated, each interested person shall promptly notify the presiding officer of his particular interest with respect to each such issue.

(4) *Examination and cross-examination by the presiding officer.* The presiding officer may conduct any examination, including cross-examination, to which a person may be entitled. For that purpose he may require submission of written requests for presentation of questions to any person making oral presentations and shall determine whether to ask such questions or any other questions. All requests for presentation of questions shall be placed in the rulemaking record.

(5) *Examination, cross-examination, and the presentation of rebuttal submissions by interested persons*—(i) *In general.* The presiding officer shall conduct or allow to be conducted examination, including cross-examination of oral presentations and the presentation of rebuttal submissions relevant to the issues designated for consideration in accordance with paragraphs (d)(5) and (d)(6) of this section. Examination, including, cross-examination, and the presentation of rebuttal submissions, shall be allowed to the extent to which it is appropriate and is required for a full and true disclosure with respect to those issues. Requests for an opportunity to examine, including cross-examine, or to present rebuttal submissions, shall be accompanied by a specific justification therefor. In determining whether or not to grant such requests, the presence of the following circumstances indicate that such requests should be granted:

(A) An issue for examination including cross-examination, or the presentation of rebuttal submissions, is an issue of specific in contrast to legislative fact.

(B) A full and true disclosure with respect to the issue can only be achieved through examination including cross-examination rather than through rebuttal submissions or the presentation of additional oral submissions.

(C) Circumstantial guarantees of the trustworthiness of a presentation do not exist.

(D) The particular presentation is required for the resolution of a designated issue.

(ii) *Selection of representatives for cross-examination.* After consideration of the information supplied in response to the final notice, the presiding officer shall identify groups of persons with the same or similar interests in the proceeding. Any such group may be required to select a single representative for the purpose of examination, including cross-examination. If a group is unable to select a representative then the presiding officer may select a representative of each such group.

(iii) *Inability to select representative for examination, including cross-examination.* No person shall be denied the opportunity to conduct or have conducted, examination, including cross-examination, under paragraph (d)(5)(i) of this section if he is a member of a group as described in paragraph (d)(5) (ii) of this section and is unable to agree upon group representation with other group members after a good faith effort to do so and seeks to present substantial and relevant issues which will not be adequately presented by the group representative. In that event he shall be allowed to conduct or have conducted any examination, including cross-examination, to which he is entitled on issues designated for consideration in accordance with paragraphs (d)(5) and (d)(6) of this section and which affect his particular interest.

(6) *Requests to compel the attendance of persons or the production of documents or to obtain responses to written questions.* During the course of the rulemaking proceeding, the presiding officer shall entertain requests from the Commission's staff or any interested person to compel the attendance of persons or the production of documents or to obtain responses to written questions. Requests to compel the attendance of persons or the production of documents or to obtain responses to written questions shall contain a statement showing the general relevancy of the material, information

or presentation, and the reasonableness of the scope of the request, together with a showing that such material, information or presentation is not available by voluntary methods and cannot be obtained through examination, including cross-examination, of oral presentations or the presentation of rebuttal submissions, and is appropriate and required for a full and true disclosure with respect to the issues designated for consideration in accordance with paragraphs (d)(5) and (d)(6) of this section. If the presiding officer determines that a request should be granted, he shall transmit his determination to the Commission which shall determine whether to issue a civil investigative demand under § 2.7(b). Information received in response to such a demand may be disclosed in the rulemaking proceeding subject to an *in camera* order under § 1.18(b).

(e) *Written transcript.* A verbatim transcript shall be made of the informal hearing which transcript shall be placed in the rulemaking record.

(f) *Staff recommendations.* The staff shall make recommendations to the Commission in a report on the rulemaking record. Such report shall contain its analysis of the record and its recommendations as to the form of the final rule.

(g) *Recommended decision.* After publication of the staff report, the presiding officer shall make a recommended decision based upon his or her findings and conclusions as to all relevant and material evidence, and taking into account the staff report. The recommended decision shall be made by the presiding officer who presided over the rulemaking proceeding except that such recommended decision may be made by another officer if the officer who presided over the proceeding is no longer available to the Commission.

(h) *Postrecord comment.* The staff report and the presiding officer's recommended decision shall be the subject of public comment for a period to be prescribed by the presiding officer at the time the recommended decision is placed in the rulemaking record. The comment period shall be no less than sixty (60) days. The comments shall be confined to information already in the record and may include requests for review by the Commission of determinations made by the presiding officer.

(i) *Commission review of the rulemaking record.* The Commission shall review the rulemaking record to determine what form of rule, if any, it should promulgate. During this review process, the Commission may allow persons who have previously participated in the proceeding to make oral presentations to the Commission, unless it determines with respect to that proceeding that such presentations would not significantly assist it in its deliberations. Presentations shall be confined to information already in the rulemaking record. Requests to participate in an oral presentation must be received by the Commission no later than the close of the comment period under § 1.13(h). The identity of the participants and the format of such presentations will be announced in advance by the Office of Public Information in the Commisison's *Weekly Calendar and Notice of "Sunshine" Meetings* and in accordance with the applicable provisions of 5 U.S.C. 552(b) and § 4.15 of the Commission's Rules of Practice. Such presentations will be transcribed verbatim or summarized at the discretion of the Commission and a copy of the transcript or summary and copies of any written communications and summaries of any oral communications relating to such presentations shall be placed on the rulemaking record.

[40 FR 33966, Aug. 13, 1975, as amended at 43 FR 39084, Sept. 1, 1978; 45 36341, May 29, 1980; 45 FR 78628, Nov. 26, 1980; 46 FR 14888, Mar. 3, 1981; 46 FR 26288, May 12, 1981; 50 FR 53303, Dec. 31, 1985]

§ 1.14 Promulgation.

(a) The Commission, after review of the rulemaking record, may issue, modify, or decline to issue any rule. Where it believes that it should have further information or additional views of interested persons, it may withhold final action pending the receipt of such additional information or views. If it determines not to issue a rule, it may adopt and publish an explanation for not doing so.

(1) *Statement of Basis and Purpose.* If the Commission determines to promulgate a rule, it shall adopt a Statement of Basis and Purpose to accompany the rule which shall include: (i) A statement as to the prevalence of the acts or practices treated by the rule; (ii) a statement as to the manner and context in which such acts or practices are unfair or deceptive; (iii) a statement as to the economic effect of the rule, taking into account the effect on small businesses and consumers; (iv) a statement as to the effect of the rule on state and local laws; and (v) a statement of the manner in which the public may obtain copies of the final regulatory analysis.

(2) *Final Regulatory Analysis.* Except as otherwise provided by statute, if the Commission determines to promulgate a final rule, it shall issue a final regulatory analysis relating to the final rule. Each final regulatory analysis shall contain:

(i) A concise statement of the need for, and the objectives of, the final rule;

(ii) A description of any alternatives to the final rule which were considered by the Commission;

(iii) An analysis of the projected benefits and any adverse economic effects and any other effects of the final rule;

(iv) An explanation of the reasons for the determination of the Commission that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen;

(v) A summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues; and

(vi) The information required by the Regulatory Flexibility Act at 5 U.S.C. 604.

(b) In the event the Commission determines, upon its review of the rulemaking record, to propose a revised rule for further proceedings in accordance with this subpart, such proceedings, including the opportunity of interested persons to avail themselves of the procedures of § 1.13 (d)(5) and (d)(6), shall be limited to those portions of the revised rule, the subjects and issues of which were not substantially the subject of comment in response to a previous notice of proposed rulemaking.

(c) The final rule and Statement of Basis and Purpose shall be published in the FEDERAL REGISTER. A rule issued under this subpart shall be deemed promulgated at 3:00 PM Eastern Standard Time on the fourth day after the date on which the final rule and Statement of Basis and Purpose are published in the FEDERAL REGISTER. In the event such day is a Saturday, Sunday or national holiday, then the rule is deemed promulgated at 3:00 PM Eastern Standard Time on the following business day.

[40 FR 33966, Aug. 13, 1975, as amended at 46 FR 26289, May 12, 1981; 50 FR 53304, Dec. 31, 1985]

§ 1.15 Amendment or repeal of a rule.

(a) *Substantive amendment or repeal of a rule.* The procedures for substantive amendment to or repeal of a rule are the same as for the issuance thereof.

(b) *Nonsubstantive amendment of a rule.* The Commission may make a nonsubstantive amendment to a rule by announcing the amendment in the FEDERAL REGISTER.

[46 FR 26289, May 12, 1981]

§ 1.16 Petition for exemption from trade regulation rule.

Any person to whom a rule would otherwise apply may petition the Commission for an exemption from such rule. The procedures for determining such a petition shall be those of Subpart C of these rules.

§ 1.17 Compensation for representation in rulemaking proceedings.

(a) *Purpose of compensation.* The Commission may provide compensation for reasonable attorneys fees, expert witness fees and other costs of participation, including costs necessary for the preparation of oral or written presentations, to any person who has or represents an interest which would not otherwise be adequately represented in a rulemaking proceeding, and representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.

(b) *Level of funding.* At or after the time of the initial notice of proposed rulemaking, the Commission may announce a tentative total level of funding for compensation for participation in that proceeding.

(c) *Applications.* An application for compensation for participation in a rulemaking proceeding may be filed at any time after the publication of the initial notice of proposed rulemaking. An application for compensation shall be filed prior to the time when the costs for which compensation is sought are incurred. Such application shall contain the following:

(1) A description of the interest the applicant has or represents in the rulemaking proceeding;

(2) A statement of the reasons representation of such interest is necessary for a fair determination of the proceeding taken as a whole;

(3) Insofar as possible, the reasons why such interest would not otherwise be adequately represented in the proceeding;

(4) A statement of the reasons the applicant is unable effectively to participate in the rulemaking proceeding without financial assistance including information relating to:

(i) The economic stake of the interest involved as compared with the costs of participation;

(ii) The feasibility of contributions to the costs of participation by individual representatives of the interest;

(iii) The resources of the applicant, or of the interest represented by the applicant;

(5) Insofar as possible, a specific statement of the expenses to be incurred for which compensation is sought, including an estimate of the total anticipated expenses; and

(6) A statement of the applicant's organizational and financial status in such form as the Commission may prescribe.

(d) *Determination of applications*—(1) *By the presiding officer.* The presiding officer shall consider applications for compensation filed under this section and forward initial findings to the General Counsel as to whether the applicant meets the criteria of paragraph (a) of this section. In determining whether the representation of an interest is necessary for a fair determination of the proceeding taken as a whole, the presiding officer shall consider, among other factors, the number and complexity of the issues involved and the importance of a fair, balanced representation of all interests. In determining whether an applicant can afford to pay the costs of participation, the presiding officer shall consider, among other factors, the size of the economic stake of the interest involved as compared with costs of participation; the resources of the applicant; and the feasibility of obtaining contributions from other parties who share the applicant's interest. In connection with his determination the presiding officer may conduct such inquiry of the applicant or require the production of such documents as he deems necessary.

(2) *By the General Counsel.* The General Counsel shall review applications and the initial findings of the presiding officer and determine, in his discretion, to what extent compensation shall be authorized under this section.

(e) *Payment of compensation*—(1) *In general.* The Commission will compensate the applicant only for those authorized expenses actually incurred. Appropriate proof of actual expenditures may be required by the Commission. The Commission may make any payments under this section in advance where necessary to permit effective participation in the rulemaking proceeding. Payment will be conditioned upon the execution by the applicant of an appropriate agreement setting forth the terms and conditions of the compensation.

(2) Effective until the end of fiscal year 1982, the amount of compensation which may be paid to any applicant approved for reimbursement of

participation costs may not exceed $75,000 per rulemaking proceeding; the aggregate amount of compensation paid in any fiscal year for all rulemaking proceedings to any such person may not exceed $50,000. Computation of these limits shall begin with funds approved May 28, 1980, after the effective date of the FTC Improvements Act of 1980.

(f) *Participation of small businesses.* To ensure a fair determination in rulemaking proceedings, the Commission solicits public comment from small businesses whose views otherwise would not be adequately represented. The Commission encourages small business participation in the compensation program by disseminating to small businesses information which explains the procedures and requirements applicable to the receipt of compensation.

(g) *Funds set aside for persons who would be regulated by proposed rules.* The Commission reserves an amount equal to 25 percent of the annual fiscal appropriations for participation costs under this program. This reserved amount is available for reimbursement only to persons who (1) would be regulated by the proposed rule involved or (2) represent persons who would be so regulated.

[40 FR 33966, Aug. 13, 1975, as amended at 43 FR 39084, Sept. 1, 1978; 46 FR 26289, May 12, 1981]

§ 1.18 Rulemaking record.

(a) *Definition.* For purposes of these rules the term "rulemaking record" includes the rule, its Statement of Basis and Purpose, the verbatim transcripts of the informal hearing, written submissions, the recommended decision of the presiding officer, and the staff recommendations as well as any public comment thereon, verbatim transcripts or summaries of oral presentations to the Commission any communications placed on the rulemaking record pursuant to § 1.18c and any other information which the Commission considers relevant to the rule.

(b) *Public availability.* The rulemaking record shall be publicly available except when the presiding officer, for good cause shown, determines that it is in the public interest to allow any submission to be received in camera subject to the provisions of § 4.11 of this chapter.

(c) *Communications to Commissioners and Commissioners' personal staffs*—(1) *Communications by outside parties.* Except as otherwise provided in this subpart or by the Commission, after the Commission votes to issue an initial notice of proposed rulemaking, comment on the proposed rule should be directed to the presiding officer pursuant to § 1.13. Communications with respect to the merits of that proceeding from any outside party to any Commissioner or Commissioner advisor shall be subject to the following treatment:

(i) *Written communications.* Written communications, including written communications from members of Congress, received within the period for acceptance of initial written comments shall be forwarded promptly to the presiding officer for placement on the rulemaking record. Written communications received after the time period for acceptance of initial written comments but prior to any other deadline for the acceptance of written submissions will be forwarded promptly to the presiding officer, who will determine whether such communications comply with the applicable requirements for written submissions at that stage of the proceeding. Communications that comply with such requirements will be promptly placed on the rulemaking record. Noncomplying communications and all communications received after the time periods for acceptance of written submissions will be placed promptly on the public record.

(ii) *Oral communications.* Oral communications are permitted only when advance notice of such oral communications is published by the Commission's Office of Public Information in its *Weekly Calendar and Notice of "Sunshine" Meetings* and when such oral communications are transcribed verbatim or summarized at the discretion of the Commissioner or Commissioner advisor to whom such oral communications are made and are promptly placed on the rulemaking record together with any written communications and summaries of any oral communications relating to such oral communications. Transcripts or summaries of oral communications which occur after the time period for acceptance of initial written comments but prior to any other deadline for the acceptance of written submissions will be forwarded promptly to the presiding officer together with any written communications and summaries of any oral communications relating to such oral communications. The presiding officer will determine whether such oral communications comply with the applicable requirements for written submissions at that stage of the proceeding. Transcripts or summaries of oral communications that comply with such requirements will be promptly placed on the rulemaking record together with any written communications and summaries of any oral communications relating to such oral communications. Transcripts or summaries of noncomplying oral communications will be promptly placed on the public record together with any written communications and summaries of any oral communications relating to such oral communications. No oral communications are permitted subsequent to the close of the postrecord comment period, except as provided in § 1.13(i). If an oral communication does otherwise occur, the Commissioner or Commissioner advisor will promptly place on the public record either a transcript of the communication or a memorandum setting forth the contents of the communication and the circumstances thereof; such transcript or memorandum will not be part of the rulemaking record.

(iii) *Congressional communications.* The provisions of paragraph (c)(1)(ii) of this section do not apply to communications from members of Congress. Memoranda prepared by the Commissioner or Commissioner advisor setting forth the contents of any oral congressional communications will be placed on the public record. If the communication occurs within the initial comment period and is transcribed verbatim or summarized, the transcript or summary will be promptly placed on the rulemaking record. A transcript or summary of any oral communication which occurs after the time period for acceptance of initial written comments but prior to any other deadline for the acceptance of written submissions will be forwarded promptly to the presiding officer, who will determine whether such oral communication complies with the applicable requirements for written submissions at that stage of the proceeding. Transcripts or summaries of oral communications that comply with such requirements will be promptly placed on the rulemaking record. Transcripts or summaries of noncomplying oral communications will be placed promptly on the public record.

(2) *Communications by certain officers, employees, and agents of the Commission.* Any officer, employee, or agent of the Commission with investigative or other responsibility relating to any rulemaking proceeding within any operating bureau of the Commission is prohibited from communicating or causing to be communicated to any Commissioner or to the personal staff of any Commissioner any fact which is relevant to the merits of such proceeding and which is not on the rulemaking record of such proceeding, unless such communication is made available to the public and is included in the rulemaking record. The provisions of this subsection shall not apply to any communication to the extent such communication is required for the disposition of *ex parte* matters as authorized by law.

(Sec. 6(g), 38 Stat. 721 (15 U.S.C. 46), 80 Stat. 383, as amended (5 U.S.C. 552))

[42 FR 43974, Sept. 1, 1977, and 42 FR 60563, Nov. 28, 1977, as amended at 44 FR 16368, Mar. 19, 1979; 44 FR 21005, Apr. 9, 1979; 45 FR 78628, Nov. 26, 1980; 50 FR 53304, Dec. 31, 1985]

§ 1.19 Modification of a rule by the Commission at the time of judicial review.

In the event that a reviewing court determines under section 18(e)(2) of the Federal Trade Commission Act, to allow further submissions and presentations on the rule, the Commission may modify or set aside its rule or make a new rule by reason of the additional submissions and presentations. Such modified or new rule shall then be filed with the court together with an appropriate Statement of Basis and Purpose and the return of such submissions and presentations.

[40 FR 33966, Aug. 15, 1975, as amended at 50 FR 53304, Dec. 31, 1985]

§ 1.20 Alternative procedures.

If the Commission determines at the commencement of a rulemaking proceeding to employ procedures other than those established in the remainder of this subpart, it may do so by announcing those procedures in the FEDERAL REGISTER notice commencing the rulemaking proceeding.

[43 FR 35683, Aug. 11, 1978]

Subpart C—Rules Promulgated Under Authority Other Than Section 18(a)(1)(B) of the FTC Act

§ 1.21 Scope of the rules in this subpart.

This subpart sets forth procedures for the promulgation of rules under authority other than section 18(a)(1)(B) of the FTC Act except as otherwise required by law or otherwise specified in the rules of this chapter. This subpart does not apply to the promulgation of industry guides, general statements of policy, rules of agency organization, procedure, or practice, or rules governed by Subpart B of this part.

[50 FR 53304, Dec. 31, 1985]

§ 1.22 Rulemaking.

(a) *Nature and authority.* For the purpose of carrying out the provisions of the statutes administered by it, the Commission is empowered to promulgate rules and regulations applicable to unlawful trade practices. Such rules and regulations express the experience and judgment of the Commission, based on facts of which it has knowledge derived from studies, reports, investigations, hearings, and other proceedings, or within official notice, concerning the substantive requirements of the statutes which it administers.

(b) *Scope.* Rules may cover all applications of a particular statutory provision and may be nationwide in effect, or they may be limited to particular areas or industries or to particular product or geographic markets, as may be appropriate.

(c) *Use of rules in adjudicative proceedings.* When a rule is relevant to any issue involved in an ajudicative proceeding thereafter instituted, the Commission may rely upon the rule to resolve such issue, provided that the respondent shall have been given a fair hearing on the applicability of the rule to the particular case.

[40 FR 15232, Apr. 4, 1975]

§ 1.23 Quantity limit rules.

Quantity limit rules are authorized by section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. These rules have the force and effect of law.

[32 FR 8444, June 13, 1967. Redesignated at 40 FR 15232, Apr. 4, 1975]

§ 1.24 Rules applicable to wool, fur, and textile fiber products and rules promulgated under the Fair Packaging and Labeling Act.

Rules having the force and effect of law are authorized under section 6 of the Wool Products Labeling Act of 1939, section 8 of the Fur Products Labeling Act, section 7 of the Textile Fiber Products Identification Act, and sections 4, 5, and 6 of the Fair Packaging and Labeling Act.

[40 FR 15233, Apr. 4, 1975]

§ 1.25 Initiation of proceedings—petitions.

Proceedings for the issuance of rules or regulations, including proceedings for exemption of products or classes of products from statutory requirements, may be commenced by the Commission upon its own initiative or pursuant to petition filed with the Secretary by any interested person or group stating reasonable grounds therefor. Anyone whose petition is not deemed by the Commission sufficient to warrant the holding of a rulemaking proceeding will be promptly notified of that determination and given an opportunity to submit additional data. Procedures for the amendment or repeal of a rule or regulation are the same as for the issuance thereof.

[32 FR 8444, June 13, 1967. Redesignated at 40 FR 15232, Apr. 4, 1975]

§ 1.26 Procedure.

(a) *Investigations and conferences.* In connection with any rulemaking proceeding, the Commission at any time may conduct such investigations, make such studies, and hold such conferences as it may deem necessary. All or any part of any such investigation may be conducted under the provisions of Subpart A of Part 2 of this chapter.

(b) *Notice.* General notice of proposed rulemaking will be published in the Federal Register and, to the extent practicable, otherwise made available to interested persons except when the Commission for good cause finds that notice and public procedure relating to the rule are impractical, unnecessary or contrary to the public interest and incorporates such finding and a brief statement of the reasons therefor in the rule. If the rulemaking proceeding was instituted pursuant to petition, a copy of the notice will be served on the petitioner. Such notice will include:

(1) A statement of the time, place, and nature of the public proceedings; (2) reference to the authority under which the rule is proposed; (3) either the terms or substance of the proposed rule or description of the subjects and issues involved; (4) an opportunity for interested persons to participate in the proceeding through the submission of written data, views, or arguments; and (5) a statement setting forth such procedures for treatment of communications from persons not employed by the Commission to Commissioners or Commissioner Advisors with respect to the merits of the proceeding as will incorporate the requirements of § 1.18(c), including the transcription of oral communications required by § 1.18(c)(2), adapted in such form as may be appropriate to the circumstances of the particular proceeding.

(c) *Oral hearings.* Oral hearing on a proposed rule may be held within the discretion of the Commission, unless otherwise expressly required by law. Any such hearing will be conducted by the Commission, a member thereof, or a member of the Commission's staff. At the hearing interested persons may appear and express their views as to the proposed rule and may suggest such amendments, revisions, and additions thereto as they may consider desirable and appropriate. The presiding officer may impose reasonable limitations upon the length of time allotted to any person. If by reason of the limitations imposed the person cannot complete the presentation of his suggestions, he may within twenty-four (24) hours file a written statement covering those relevant matters which he did not orally present.

(d) *Promulgation of rules or orders.* The Commission, after consideration of all relevant matters of fact, law, policy, and discretion, including all relevant matters presented by interested persons in the proceeding, will adopt and publish in the Federal Register an appropriate rule or order, together with a concise general statement of its basis and purpose and any necessary findings, or will give other appropriate public notice of disposition of the proceeding.

(e) *Effective date of rules.* Except as provided in paragraphs (f) and (g) of this section, the effective date of any rule, or of the amendment, suspension, or repeal of any rule will be as specified in a notice published in the Federal Register, which date will be not less than thirty (30) days after the date of such publication unless an earlier effective date is specified by the Commission upon good cause found and published with the rule.

(f) *Effective date of rules and orders under Fair Packaging and Labeling Act.* The effective date of any rule or order under the Fair Packaging and Labeling Act will be as specified by order published in the Federal Register, but shall not be prior to the day following the last day on which objections may be filed under paragraph (g) of this section.

(g) *Objections and request for hearing under Fair Packaging and Labeling Act.* On or before the thirtieth (30th) day after the date of publication of an order in the Federal Register pursuant to paragraph (f) of this section, any person who will be adversely affected by the order if placed in effect may file objections thereto with the Secretary of the Commission, specifying with particularity the provisions of the order deemed objectionable, stating the grounds therefor, and requesting a public hearing upon such objections. Objections will be deemed sufficient to warrant the holding of a public hearing only:

(1) If they establish that the objector will be adversely affected by the order; (2) if they specify with particularity the provisions of the order to which objection is taken; and (3) if they are supported by reasonable grounds which, if valid and factually supported, may be adequate to justify the relief sought. Anyone who files objections which are not deemed by the Commission sufficient to warrant the holding of a public hearing will be promptly notified of that determination. As soon as practicable after the time for filing objections has expired, the Commission will publish a notice in the FEDERAL REGISTER specifying those parts of the order which have been stayed by the filing of objections or, if no objections sufficient to warrant the holding of a hearing have been filed, stating that fact.

[32 FR 8444, June 13, 1967. Redesignated at 40 FR 15232, Apr. 4, 1975, and amended at 44 FR 16368, Mar. 19, 1979; 50 FR 53304, Dec. 31, 1985]

Subpart D—Administration of the Wool Products Labeling Act of 1939, Fur Products Labeling Act, and Textile Fiber Products Identification Act

§ 1.31 Administration.

The general administration of the Wool Products Labeling Act of 1939, Fur Products Labeling Act, and Textile Fiber Products Identification Act, and of the respective rules and regulations thereunder is carried out by the Bureau of Consumer Protection. Any interested person may obtain copies of the several Acts and rules and regulations upon request to the Secretary of the Commission.

[35 FR 10584, June 30, 1970, as amended at 41 FR 4814, Feb. 2, 1976]

§ 1.32 Registered identification numbers.

Registered identification numbers are issued by the Commission under the provisions of Rule 4 of the rules and regulations under the Wool Products Labeling Act of 1939 (§ 300.4 of this chapter); Rule 26 of the rules and regulations under the Fur Products Labeling Act (§ 301.26 of this chapter); and Rule 20 of the rules and regulations under the Textile Fiber Products Identification Act (§ 303.20 of this chapter). Such numbers are for use as required identification in lieu of the name of the person to whom the number has been issued in satisfying the identification requirement in labeling under the respective Acts. Any person marketing wool products, textile fiber products, or fur or fur products, in commerce, may file an application with the Secretary of the Commission for issuance of a registered identification number. The Commission will furnish application forms upon request. Numbers are issued when, upon examination of the application, the applicant is found to come within the terms of the applicable rules and regulations. Numbers are subject to revocation for cause or upon a change in business status or discontinuance of business. The identity of holders of registered identification numbers issued by the Commission is released upon oral or written request directed to the Enforcement Division of the Bureau of Consumer Protection.

[32 FR 8444, June 13, 1967, as amended at 39 FR 23699, July 19, 1974; 46 FR 26290, May 12, 1981; 50 FR 53304, Dec. 31, 1985]

§ 1.33 Continuing guaranties.

Continuing guaranties may be filed with the Commission under section 9 of the Wool Products Labeling Act of 1939 and Rule 33 of the rules and regulations thereunder (§ 300.33 of this chapter); section 10 of the Fur Products Labeling Act and Rule 48 of the rules and regulations thereunder (§ 301.48 of this chapter); and section 10 of the Textile Fiber Products Identification Act and Rule 38 of the rules and regulations thereunder (§ 303.38 of this chapter). Upon receipt of continuing guaranties duly executed according to form and substance as prescribed in the applicable rules and regulations, they are filed and made public. Necessary forms may be obtained from the Commission upon request.

[32 FR 8444, June 13, 1967, as amended at 41 FR 4814, Feb. 2, 1976]

§ 1.34 Inspections and counseling.

The Commission maintains a staff to carry on compliance inspection and industry counseling work among manufacturers and marketers of wool products, textile fiber products, and fur or fur products. Administrative action to effect correction of minor infractions on a voluntary basis is taken in those cases where such procedure is believed adequate to effect immediate compliance and protect the public interest.

[32 FR 8444, June 13, 1967, as amended at 41 FR 4814, Feb. 2, 1976]

Subpart E—Export Trade Associations

§ 1.41 Limited antitrust exemption.

The Export Trade Act authorizes the organization and operation of export trade associations, and extends to them certain limited exemptions from the Sherman Act and the Clayton Act. It also extends the jurisdiction of the Commission under the Federal Trade Commission Act to unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States.

§ 1.42 Notice to Commission.

To obtain the exemptions afforded by the Act, an export trade association is required to file with the Commission, within thirty (30) days after its creation, a verified written statement setting forth the location of its offices and places of business, names, and addresses of its officers, stockholders, or members, and copies of its documents of incorporation or association. On the first day of January of each year thereafter, each association must file a like statement and, when required by the Commission to do so, must furnish to the Commission detailed information as to its organization, business, conduct, practices, management, and relation to other associations, corporations, partnerships, and individuals.

§ 1.43 Recommendations.

Whenever the Commission has reason to believe that an association has violated the prohibitions of section 2 of the Act, it may conduct an investigation. If, after investigation, it concludes that the law has been violated, it may make to such association recommendations for the readjustment of its business. If the association fails to comply with the recommendations, the Commission will refer its findings and recommendations to the Attorney General for appropriate action.

Subpart F—Trademark Cancellation Procedure

§ 1.51 Applications.

Applications for the institution of proceedings for the cancellation of registration of trade, service, or certification marks under the Trade-Mark Act of 1946 may be filed with the Secretary of the Commission. Such applications shall be in writing, signed by or in behalf of the applicant, and should identify the registration concerned and contain a short and simple statement of the facts constituting the alleged basis for cancellation, the name and address of the applicant, together with all relevant and available information. If, after consideration of the application, or upon its own initiative, the Commission concludes that cancellation of the mark may be warranted, it will institute a proceeding before the Commissioner of Patents for cancellation of the registration.

Subpart G—Injunctive and Condemnation Proceedings

§ 1.61 Injunctions.

In those cases where the Commission has reason to believe that it would be to the interest of the public, the Commission will apply to the courts for injunctive relief, pursuant to the authority granted in section 13 of the Federal Trade Commission Act.

[40 FR 15233, Apr. 4, 1975]

§ 1.62 Ancillary court orders pending review.

Where petition for review of an order to cease and desist has been filed in a U.S. court of appeals, the Commission may apply to the court for issuance of such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite.

§ 1.63 Injunctions: Wool, fur, and textile cases.

In those cases arising under the Wool Products Labeling Act of 1939, Fur Products Labeling Act, and Textile Fiber Products Identification Act, where it appears to the Commission that it would be to the public interest for it to do so, the Commission will apply to the courts for injunctive relief, pursuant to the authority granted in such Acts.

[32 FR 8444, June 13, 1967, as amended at 41 FR 4814, Feb. 2, 1976]

§ 1.64 Condemnation proceedings.

In those cases arising under the Wool Products Labeling Act of 1939 and Fur Products Labeling Act, and where it appears to the Commission that the public interest requires such action, the Commission will apply to the courts for condemnation, pursuant to the authority granted in such Acts.

[32 FR 8444, June 13, 1967, as amended at 41 FR 4814, Feb. 2, 1976]

Subpart H—Administration of the Fair Credit Reporting Act

AUTHORITY: 84 Stat. 1128, 15 U.S.C. 1681 et seq.

§ 1.71 Administration.

The general administration of the Fair Credit Reporting Act (Title VI of the Consumer Credit Protection Act of 1968; enacted October 26, 1970; Pub. L. 91-508, 82 Stat. 146, 15 U.S.C. 1601 et seq.) is carried out by the Bureau of Consumer Protection, Division of Credit Practices. Any interested person may obtain copies of the Act and these procedures and rules of practice upon request to the Secretary of the Commission, Washington, D.C. 20580.

[36 FR 9293, May 22, 1971, as amended at 36 FR 18788, Sept. 22, 1971; 38 FR 32438, Nov. 26, 1973; 46 FR 26290, May 12, 1981]

§ 1.72 Examination, counseling and staff advice.

The Commission maintains a staff to carry out on-the-scene examination of records and procedures utilized to comply with the Fair Credit Reporting Act and to carry out industry counseling. Requests for staff interpretation of the Fair Credit Reporting Act should be directed to the Division of Credit Practices, Bureau of Consumer Protection. Such interpretations represent informal staff opinion which is advisory in nature and is not binding upon the Commission as to any action it may take in the matter. Administrative action to effect correction of minor infractions on a voluntary basis is taken in those cases where such procedure is believed adequate to effect immediate compliance and protect the public interest.

[36 FR 9293, May 22, 1971, as amended at 36 FR 18788, Sept. 22, 1971; 38 FR 32438, Nov. 26, 1973; 46 FR 26290, May 12, 1981]

§ 1.73 Interpretations.

(a) *Nature and purpose.* (1) The Commission issues and causes to be published in the FEDERAL REGISTER interpretations of the provisions of the Fair Credit Reporting Act on its own initiative or pursuant to the application of any person when it appears to the Commission that guidance as to the legal requirements of the Act would be in the public interest and would serve to bring about more widespread and equitable observance of the Act.

(2) The interpretations are not substantive rules and do not have the force or effect of statutory provisions. They are guidelines intended as clarification of the Fair Credit Reporting Act, and, like industry guides, are advisory in nature. They represent the Commission's view as to what a particular provision of the Fair Credit Reporting Act means for the guidance of the public in conducting its affairs in conformity with that Act, and they provide the basis for voluntary and simultaneous abandonment of unlawful

practices by members of industry. Failure to comply with such interpretations may result in corrective action by the Commission under applicable statutory provisions.

(b) *Procedure.* (1) Requests for Commission interpretations should be submitted in writing to the Secretary of the Federal Trade Commission stating the nature of the interpretation requested and the reasons and justification therefor. If the request is granted, as soon as practicable thereafter, the Commission will publish a notice in the FEDERAL REGISTER setting forth the text of the proposed interpretation. Comments, views, or objections, together with the grounds therefor, concerning the proposed interpretation may be submitted to the Secretary of the Commission within thirty (30) days of public notice thereof. The proposed interpretation will automatically become final after the expiration of sixty (60) days from the date of public notice thereof, unless upon consideration of written comments submitted as hereinabove provided, the Commission determine to rescind, revoke, modify, or withdraw the proposed interpretation, in which event notification of such determination will be published in the FEDERAL REGISTER.

(2) The issuance of such interpretations is within the discretion of the Commission and the Commission at any time may conduct such investigations and hold such conferences or hearings as it may deem appropriate. Any interpretation issued pursuant to this chapter is without prejudice to the right of the Commission to reconsider the interpretation, and where the public interest requires, to rescind, revoke, modify, or withdraw the interpretation, in which event notification of such action will be published in the FEDERAL REGISTER.

(c) *Applicability of interpretations.* Interpretations issued pursuant to this subpart may cover all applications of a particular statutory provision, or they may be limited in application to a particular industry, as appropriate.

[36 FR 9293, May 22, 1971]

Subpart I—Procedures for Implementation of the National Environmental Policy Act of 1969

AUTHORITY: 15 U.S.C. 46(g), 42 U.S.C. 4321 *et seq.*

SOURCE: 47 FR 3096, Jan. 22, 1982, unless otherwise noted.

§ 1.81 Authority and incorporation of CEQ Regulations.

This subpart is issued pursuant to 102(2) of the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*). Pursuant to Executive Order 11514 (March 5, 1970, as amended by Executive Order 11991, May 24, 1977) and the Environmental Quality Improvement Act of 1980, as amended (42 U.S.C. 4371 *et seq.*) the Council on Environmental Quality (CEQ) has issued comprehensive regulations for implementing the procedural provisions of NEPA (40 CFR Parts 1500 through 1508) ("CEQ Regulations"). Although it is the Commission's position that these regulations are not binding on it, the Commission's policy is to comply fully with the CEQ Regulations unless it determines in a particular instance or for a category of actions that compliance would not be consistent with the requirements of law. With this caveat, the Commission incorporates into this subpart the CEQ Regulations. The following are supplementary definitions and procedures to be applied in conjunction with the CEQ Regulations.

[47 FR 3096, Jan. 22, 1982, as amended at 50 FR 53304, Dec. 31, 1985]

§ 1.82 Declaration of policy.

(a) Except for actions which are not subject to the requirements of section 102(2)(C) of NEPA, no Commission proposal for a major action significantly affecting the quality of the human environment will be instituted unless an environmental impact statement has been prepared for consideration in the decisionmaking. All relevant environmental documents, comments, and responses as provided in this subpart shall accompany such proposal through all review processes. "Major actions, significantly affecting the quality of the human environment" referred to in this subpart "do not include bringing judicial or administrative civil or criminal enforcement actions" CEQ Regulation (40 CFR 1508.18(a)). In the event that the Commission in an administrative enforcement proceeding actively contemplates the adoption of standards or a form of relief which it determines may have a significant effect on the environment, the Commission will, when consistent with the requirements of law, provide for the preparation of an environmental assessment or an environmental impact statement or such other action as will permit the Commission to assess alternatives with a view toward avoiding or minimizing any adverse effect upon the environment.

(b) No Commission proposal for legislation significantly affecting the quality of the human environment and concerning a subject matter in which the Commission has primary responsibility will be submitted to Congress without an accompanying environmental impact statement.

(c) When the Commission finds that emergency action is necessary and an environmental impact statement cannot be prepared in conformance with the CEQ Regulations, the Commission will consult with CEQ about alternative arrangements in accordance with CEQ Regulation (40 CFR 1506.11).

§ 1.83 Whether to commence the process for an environmental impact statement.

(a) The Bureau responsible for submitting a proposed rule, guide, or proposal for legislation to the Commission for agency action shall, after consultation with the Office of the General Counsel, initially determine whether or not the proposal is one which requires an environmental impact statement. Except for matters where the environmental effects, if any, would appear to be either (1) clearly significant and therefore the decision is made to prepare an environmental impact statement, or (2) so uncertain that environmental analysis would be based on speculation, the Bureau should normally prepare an "environmental assessment" CEQ Regulation (40 CFR 1508.9) for purposes of providing sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact. The Bureau should involve environmental agencies to the extent practicable in preparing an assessment. An environmental assessment shall be made available to the public when the proposed action is made public along with any ensuing environmental impact statement or finding of no significant impact.

(b) If the Bureau determines that the proposal is one which requires an environmental impact statement, it shall commence the "scoping process" CEQ Regulation (40 CFR 1501.7) except that the impact statement which is part of a proposal for legislation need not go through a scoping process but shall conform to CEQ Regulation (40 CFR 1506.8). As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process, the Bureau shall publish a notice of intent as provided in CEQ Regulations (40 CFR 1501.7 and 1508.22).

(c) If, on the basis of an environmental assessment, the determination is made not to prepare a statement, a finding of "no significant impact" shall be made in accordance with CEQ Regulation (40 CFR 1508.3) and shall be made available to the public as specified in CEQ Regulation (40 CFR 1506.6).

§ 1.84 Draft environmental impact statements: Availability and comment.

Except for proposals for legislation, environmental impact statements shall be prepared in two stages: Draft statement and final statement.

(a) *Proposed rules or guides.* (1) An environmental impact statement, if deemed necessary, shall be in draft form at the time a proposed rule or guide is published in the FEDERAL REGISTER and shall accompany the proposal throughout the decisionmaking process.

(2) The major decision points with respect to rules and guides are:

(i) Preliminary formulation of a staff proposal;

(ii) The time the proposal is initially published in the FEDERAL REGISTER as a Commission proposal;

(iii) Presiding officer's report (in trade regulation rule proceedings);

(iv) Submission to the Commission of the staff report or recommendation for final action on the proposed guide or rule;

(v) Final decision by the Commission. The decision on whether or not to prepare an environmental impact statement should occur at point (a)(2)(i) above. The publication of any draft impact statement should occur at point (a)(2)(ii) above. The publication of the final environmental impact statement should occur at point (a)(2)(iv) above.

(b) *Legislative proposals.* In legislative matters, a legislative environmental impact statement shall be prepared in accordance with CEQ Regulation (40 CFR 1506.8).

(c) In rule or guide proceedings the draft environmental impact statement shall be prepared in accordance with CEQ Regulation (40 CFR 1502.9) and shall be placed in the public record to which it pertains; in legislative matters, the legislative impact statement shall be placed in a public record to be established, containing the legislative report to which it pertains; these will be available to the public through the Office of the Secretary and will be published in full with the appropriate proposed rule, guide, or legislative report; such statements shall also be filed with the Environmental Protection Agency's (EPA) Office of Environmental Review (CEQ Regulation (40 CFR 1506.9) for listing in the weekly FEDERAL REGISTER Notice of draft environmental impact statements, and shall be circulated, in accordance with CEQ Regulations (40 CFR 1502.19, 1506.6) to appropriate federal, state and local agencies.

(d) Forty-five (45) days will be allowed for comment on the draft environmental impact statement, calculated from the date of publication in the EPA's weekly FEDERAL REGISTER list of draft environmental impact statements. The Commission may in its discretion grant such longer period as the complexity of the issues may warrant.

§ 1.85 Final environmental impact statements.

(a) After the close of the comment period, the Bureau responsible for the matter will consider the comments received on the draft environmental impact statement and will put the draft statement into final form in accordance with the requirements of CEQ Regulation (40 CFR 1502.9(b)), attaching the comments received (or summaries if response was exceptionally voluminous).

(b) Upon Bureau approval of the final environmental impact statement the final statement will be

(1) Filed with the EPA;

(2) Forwarded to all parties which commented on the draft environmental impact statement and to other interested parties, if practicable;

(3) Placed in the public record of the proposed rule or guide proceeding or legislative matter to which it pertains;

(4) Distributed in any other way which the Bureau in consultation with CEQ deems appropriate.

(c) In rule and guide proceedings, at least thirty (30) days will be allowed for comment on the final environmental impact statement, calculated from the date of publication in the EPA's weekly FEDERAL REGISTER list of final environmental impact statements. In no event will a final rule or guide be promulgated prior to ninety (90) days after notice of the draft environmental impact statement, except where emergency action makes such time period impossible.

§ 1.86 Supplemental statements.

Except for proposals for legislation, as provided in CEQ Regulation (40 CFR 1502.9(c)), the Commission shall publish supplements to either draft or final environmental statements if: (a) The Commission makes substantial changes in the proposed action that are relevant to environmental concerns; or (b) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action and its impacts. In the course of a trade regulation rule proceeding, the supplement will be placed in the rulemaking record.

§ 1.87 NEPA and agency decisionmaking.

In its final decision on the proposed action or, if appropriate, in its recommendation to Congress, the Commission shall consider all the alternatives in the environmental impact statement and other relevant environmental documents and shall prepare a concise statement which, in accordance with CEQ Regulation § 1505.2, shall:

(a) Identify all alternatives considered by the Commission in reaching its decision or recommendation, specifying the alternatives which were considered to be environmentally preferable;

(b) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.

§ 1.88 Implementing procedures.

(a) The General Counsel is designated the official responsible for coordinating the Commission's efforts to improve environmental quality. He will provide assistance to the staff in determining when an environmental impact statement is needed and in its preparation.

(b) The Commission will determine finally whether an action complies with NEPA.

(c) The Directors of the Bureaus of Consumer Protection and Competition will supplement these procedures for their Bureaus to assure that every proposed rule and guide is reviewed to assess the need for an environmental impact statement and that, where need exists, an environmental impact statement is developed to assure timely consideration of environmental factors.

(d) The General Counsel will establish procedures to assure that every legislative proposal on a matter for which the Commission has primary responsibility is reviewed to assess the need for an environmental impact statement and that, where need exists, and environmental impact statement is developed to assure timely consideration of environmental factors.

(e) Parties seeking information or status reports on environmental impact statements and other elements of the NEPA process, should contact the Assistant General Counsel for Litigation and Environmental Policy.

§ 1.89 Effect on prior actions.

It is the policy of the Commission to apply these procedures to the fullest extent possible to proceedings which are already in progress.

Subpart J—Economic Surveys, Investigations and Reports

§ 1.91 Authority and purpose.

General and special economic surveys, investigations, and reports are made by the Bureau of Economics under the authority of the various laws which the Federal Trade Commission administers. The Commission may in any such survey or investigation invoke any or all of the compulsory processes authorized by law.

[32 FR 8444, June 13, 1967. Redesignated at 40 FR 15233, Apr. 4, 1975]

Subpart K—Penalties for Violation of Appliance Labeling Rules

SOURCE: 45 FR 67318, Oct. 10, 1980, unless otherwise noted.

§ 1.92 Scope.

The rules in this subpart apply to and govern proceedings for the assessment of civil penalties for the violation of section 332 of the Energy Policy and Conservation Act, 42 U.S.C. 6302, and the Commission's Rules on Labeling and Advertising of Consumer Appliances, 16 CFR 305, promulgated under sections 324 and 326 of the Energy Policy and Conservation Act, 42 U.S.C. 6294 and 6296.

§ 1.93 Notice of proposed penalty.

(a) *Notice.* Before issuing an order assessing a civil penalty under this subpart against any person, the Commission shall provide to such person notice of the proposed penalty. This notice shall:

(1) Inform such person of the opportunity to elect in writing within 30 days of receipt of the notice of proposed penalty to have procedures of § 1.95 (in lieu of those of § 1.94) apply with respect to such assessment; and

(2) Include a copy of a proposed complaint conforming to the provision of § 3.11(b)(1) and (2) of the Commission's Rules of Practice, or a statement of the material facts constituting the alleged violation and the legal basis for the proposed penalty; and

(3) Include the amount of the proposed penalty; and

(4) Include a statement of the procedural rules that the Commission will follow if respondent elects to proceed under § 1.94 unless the Commission chooses to follow Subparts B, C, D, E, and F of Part 3 of this chapter.

(b) *Election.* Within 30 days of receipt of the notice of proposed penalty, the respondent shall, if it wishes to elect to have the procedures of § 1.95 apply, notify the Commission of the election in writing. The notification, to be filed in accordance with § 4.2 of this chapter, may include any factual or legal reasons for which the proposed assessment order should not issue, should be reduced in amount, or should otherwise be modified.

§ 1.94 Commission proceeding to assess civil penalty.

If the respondent fails to elect to have the procedures of § 1.95 apply, the Commission shall determine whether to issue a complaint and thereby commence an adjudicative proceeding in conformance with section 333(d)(2)(A) of the Energy Policy and Conservation Act, 42 U.S.C. 6303(d)(2)(A). If the Commission votes to issue a complaint, the proceeding shall be conducted in accordance with Subparts B, C, D, E and F of Part 3 of this chapter, unless otherwise ordered in the notice of proposed penalty. In assessing a penalty, the Commission shall take into account the factors listed in § 1.97.

§ 1.95 Procedures upon election.

(a) After receipt of the notification of election to apply the procedures of this section pursuant to § 1.93, the Commission shall promptly assess such penalty as it deems appropriate, in accordance with § 1.97.

(b) If the civil penalty has not been paid within 60 calendar days after the assessment order has been issued under paragraph (a) of this section, the General Counsel, unless otherwise directed, shall institute an action in the appropriate district court of the United States for an order enforcing the assessment of the civil penalty.

(c) Any election to have this section apply may not be revoked except with the consent of the Commission.

§ 1.96 Compromise of penalty.

The Commission may compromise any penalty or proposed penalty at any time, with leave of court when necessary, taking into account the nature and degree of violation and the impact of a penalty upon a particular respondent.

§ 1.97 Amount of penalty.

All penalties assessed under this subchapter shall be in the amount of $100 for each violation as described in section 333(a) of the Energy Policy and Conservation Act, 42 U.S.C. 6303(a), unless the Commission shall otherwise direct. In considering the amount of penalty, the Commission shall take into account:

(a) Respondent's size and ability to pay; (b) respondent's good faith; (c) any history of previous violations; (d) the deterrent effect of the penalty action; (e) the length of time involved before the Commission was made aware of the violation; (f) the gravity of the violation, including the amount of harm to consumers and the public caused by the violation; and (g) such other matters as justice may require.

PART 2—NONADJUDICATIVE PROCEDURES

Subpart A—Inquiries; Investigations; Compulsory Processes

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AUTHORITY: Sec. 6, 38 Stat. 721; 15 U.S.C. 46, unless otherwise noted.

SOURCE: 32 FR 8446, June 13, 1967, unless otherwise noted.

EDITORIAL NOTE: For nomenclature changes appearing in Part 2, see 37 FR 22611, Oct. 20, 1972.

Subpart A—Inquiries; Investigations; Compulsory Processes

§ 2.1 How initiated.

Commission investigations and inquiries may be originated upon the request of the President, Congress, governmental agencies, or the Attorney General; upon referrals by the courts; upon complaint by members of the public; or by the Commission upon its own initiative. The Commission has delegated to the Director, Deputy Directors, and Assistant Directors of the Bureau of Competition, the Director, Deputy Directors, and Associate Directors of the Bureau of Consumer Protection and, the Regional Directors and Assistant Regional Directors of the Commission's regional offices, without power of redelgation, limited authority to initiate investigations.

[48 FR 41374, Sept. 15, 1983, as amended at 50 FR 53304, Dec. 31, 1985]

§ 2.2 Request for Commission action.

(a) Any individual, partnership, corporation, association, or organization may request the Commission to institute an investigation in respect to any matter over which the Commission has jurisdiction.

(b) Such request should be in the form of a signed statement setting forth the alleged violation of law with such supporting information as is available, and the name and address of the person or persons complained of. No forms or formal procedures are required.

(c) The person making the request is not regarded as a party to any proceeding which might result from the investigation.

(d) It is the general Commission policy not to publish or divulge the name of an applicant or complaining party except as required by law or by the Commission's rules. Where a complaint is by a consumer or consumer representative concerning a specific consumer product or service, the Commission, in the course of a referral of the complaint or of an investigation, may disclose the identity of the complainant or complainants. In referring any such consumer complaint, the Commission specifically retains its right to take such action as it deems appropriate in the public interest and under any of the statutes which it administers.

[32 FR 8446, June 13, 1967, as amended at 35 FR 10146, June 20, 1970]

§ 2.3 Policy as to private controversies.

The Commission acts only in the public interest and does not initiate an investigation or take other action when the alleged violation of law is merely a matter of private controversy and does not tend adversely to affect the public.

§ 2.4 Investigational policy.

The Commission encourages voluntary cooperation in its investigations. Where the public interest requires, however, the Commission may, in any matter under investigation adopt a resolution authorizing the use of any or all of the compulsory processes provided for by law.

[45 FR 36341, May 29, 1980]

§ 2.5 By whom conducted.

Inquiries and investigations are conducted under the various statutes administered by the Commission by Commission representatives designated and duly authorized for the purpose. Such representatives are "examiners" or "Commission investigators" within the meaning of the Federal Trade Commission Act and are authorized to exercise and perform the duties of their office in accordance with the laws of the United States and the regulations of the Commission. Included among such duties is the administration of oaths and affirmations in any matter under investigation by the Commission.

[45 FR 36341, May 29, 1980]

§ 2.6 Notification of purpose.

Any person under investigation compelled or requested to furnish information or documentary evidence shall be advised of the purpose and scope of the investigation and of the nature of the conduct constituting the alleged violation which is under investigation and the provisions of law applicable to such violation.

[46 FR 26290, May 12, 1981; 46 FR 27634, May 21, 1981]

§ 2.7 Compulsory process in investigations.

(a) *In general.* The Commission or any member thereof may, pursuant to a Commission resolution, issue a subpoena or a civil investigative demand directing the person named therein to appear before a designated representative at a designated time and place to testify or to produce documentary evidence, or both, or, in the case of a civil investigative demand, to provide a written report or answers to questions relating to any matter under investigation by the Commission. Material for which a civil investigative demand has been issued shall be made available for inspection and copying at the principal place of business of the person or at such other place or in such other manner as the person and the custodian designated pursuant to § 2.16 agree.

(b) *Civil Investigative Demands.* Civil investigative demands shall be the only form of compulsory process issued in investigations with respect to unfair or deceptive acts or practices within the meaning of FTC Act section 5(a)(1).

(1) Civil investigative demands for the production of documentary material shall describe each class of material to be produced with such definiteness and certainty as to permit such material to be fairly identified, prescribe a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction, and identify the custodian to whom such material shall be made available. Production of documentary material in response to a civil investigative demand shall be made in accordance with the procedures prescribed by section 20(c)(10) of the Federal Trade Commission Act.

(2) Civil investigative demands for written reports or answers to questions shall propound with definiteness and certainty the reports to be produced or the questions to be answered, prescribe a date or dates at which time written reports or answers to questions shall be submitted, and identify the custodian to whom such reports or answers shall be submitted. Response to a civil investigative demand for a written report or answers to questions shall be made in accordance with the procedures prescribed by section 20(c)(11) of the Federal Trade Commission Act.

(3) Civil investigative demands for the giving of oral testimony shall prescribe a date, time, and place at which oral testimony shall be commenced, and identify a Commission investigator who shall conduct the investigation and the custodian to whom the transcript of such investigation shall be submitted. Oral testimony in response to a civil investigative demand shall be taken in accordance with the procedures prescribed by section 20(c)(12) of the Federal Trade Commission Act.

(c) The Bureau Director, Deputy Directors and Assistant Directors of the Bureaus of Competition and Economics, the Director, Deputy Directors and Associate Directors of the Bureau of Consumer Protection, Regional Directors, and Assistant Regional Directors, are authorized to negotiate and approve the terms of satisfactory compliance with subpoenas and civil investigative demands and, for good cause shown, may extend the time prescribed for compliance. Specifically, the subpoena power conferred by Section 329 of the Energy Policy and Conservation Act (42 U.S.C. 6299) is included within this delegation.

(d) *Petitions to limit or quash*—(1) *General.* Any petition to limit or quash any investigational subpoena or civil investigative demand shall be filed with the Secretary of the Commission within twenty (20) days after service of the subpoena or civil investigative demand, or, if the return date is less than twenty (20) days after service, prior to the return date. Such petition shall set forth all assertions of privilege or other factual and legal objections to the subpoena or civil investigative demand, including all appropriate arguments, affidavits and other supporting documentation.

(2) *Statement.* Each petition shall be accompanied by a signed statement representing that counsel for the petitioner has conferred with counsel for the Commission in an effort in good faith to resolve by agreement the issues raised by the petition and has been unable to reach such as agreement. If some of the matters in controversy have been resolved by agreement, the statement shall specify the matters so resolved and the matters remaining unresolved. The statement shall recite the date, time, and place of each such conference between counsel, and the names of all parties participating in each such conference.

(3) *Extensions of time.* Bureau Directors, Deputy Directors, and Assistant Directors in the Bureaus of Competition and Economics, the Bureau Director, Deputy Directors and Associate Directors in the Bureau of Consumer Protection, Regional Directors and Assistant Regional Directors are delegated, without power of redelegation, the authority to rule upon requests for extensions of time within which to file such petitions.

(4) *Disposition.* A Commissioner, to be designated by the Chairman, is delegated, without power of redelegation, the authority to rule upon petitions to limit or quash an investigational subpoena or civil investigative demand, but the designated Commissioner may, in his or her sole discretion, refer a petition to the full Commission for determination.

(e) *Stay of compliance period.* The timely filing of a petition to limit or quash any investigational subpoena or civil investigative demand shall stay the time permitted for compliance with the portion challenged. If the petition is denied in whole or in part, the ruling will specify a new return date.

(f) *Review.* Any petitioner, within three days after service of a ruling by the designated Commissioner denying all or a portion of the relief requested in its petition, may file with the Secretary of the Commission a request that the full Commission review the ruling. The timely filing of such a request shall not stay the return date specified in the ruling, unless otherwise specified by the Commission.

(g) *Public disclosure.* All petitions to limit or quash investigational subpoenas or civil investigative demands and the responses thereto are part of the public records of the Commission, except for information exempt from disclosure under § 4.10(a) of this chapter.

[45 FR 36342, May 29, 1980, as amended at 46 FR 26290, May 12, 1981; 48 FR 41375, Sept. 15, 1983; 49 FR 6089, Feb. 17, 1984; 50 FR 42672, Oct. 22, 1985]

§ 2.8 Investigational hearings.

(a) Investigational hearings, as distinguished from hearings in adjudicative proceedings, may be conducted in the course of any investigation undertaken by the Commission, including rulemaking proceedings under Subpart B of Part 1 of this chapter, inquiries initiated for the purpose of determining whether or not a respondent is complying with an order of the Commission or the manner in which decrees in suits brought by the United States under the antitrust laws are being carried out, the development of facts in cases referred by the courts to the Commission as a master in chancery, and investigations made under section 5 of the Export Trade Act.

(b) Investigational hearings shall be presided over by the Commission, one or more of its members, or a duly designated representative, for the purpose of hearing the testimony of witnesses and receiving documents and other data relating to any subject under investigation; and the term "presiding official," as used in this part, means and applies to the Commission or any of its members or designated representative when so presiding and the "Commission investigator" designated in a civil investigative demand for the giving of oral testimony. Such hearings shall be stenographically reported and a transcript thereof shall be made a part of the record of the investigation.

(c) Unless otherwise ordered by the Commission, investigational hearings shall not be public. In investigational hearings conducted pursuant to a civil investigative demand for the giving of oral testimony, the Commission investigators shall exclude from the hearing room all other persons except the person being examined, his counsel, the officer before whom the testimony is to be taken, and the stenographer recording such testimony. A copy of the transcript shall promptly be forwarded by the Commission investigator to the custodian designated in § 2.16.

[32 FR 8446, June 13, 1967, as amended at 45 FR 36342, May 29, 1980]

§ 2.8A Withholding requested material.

(a) Any person withholding material responsive to an investigational subpoena or civil investigative demand issued pursuant to § 2.7, an access order issued pursuant to § 2.11, an order to file a report issued pursuant to § 2.12, or any other request for production of material issued under this part, shall assert a claim of privilege or any similar claim not later than the date set for the production of material. Such person shall, if so directed in the subpoena, civil investigative demand or other request for production, submit, together with such claim, a schedule of the items withheld which states individually as to each such item the type, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged.

(b) A person withholding material solely for reasons described in § 2.8A(a) shall comply with the requirements of that subsection in lieu of filing a motion to limit or quash compulsory process.

(Sec. 5, 38 Stat. 719 as amended (15 U.S.C. 45))

[44 FR 54042, Sept. 18, 1979, as amended at 45 FR 36342, May 29, 1980]

§ 2.9 Rights of witnesses in investigations.

(a) Any person compelled to submit data to the Commission or to testify in an investigational hearing shall be entitled to retain a copy or, on payment of lawfully prescribed costs, procure a copy of any document submitted by him and of his own testimony as stenographically reported, except that in a nonpublic hearing the witness may for good cause be limited to inspection of the official transcript of his testimony. Where the investigational hearing has been conducted pursuant to a civil investigative demand issued under Section 20 of the Federal Trade Commission Act, upon completion of transcription of the testimony of the witness, the witness shall be offered an opportunity to read the transcript of his testimony. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the Commission investigator with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness unless the witnesss cannot be found, is ill, waives in writing his right to signature or refuses to sign. If the transcript is not signed by the witness within thirty days of his being afforded a reasonable opportunity to review it, the Commission investigator shall take the actions prescribed by Section 20(c)(12)(E)(ii) of the Federal Trade Commission Act.

(b) Any witness compelled to appear in person in an investigational hearing may be accompanied, represented, and advised by counsel as follows:

(1) Counsel for a witness may advise the witness, in confidence and upon the initiative of either counsel or the witness, with respect to any question asked of the witness. If the witness refuses to answer a question, then counsel may briefly state on the record if he has advised the witness not to answer the question and the legal grounds for such refusal.

(2) Where it is claimed that the testimony or other evidence sought from a witness is outside the scope of the investigation, or that the witness is privileged to refuse to answer a question or to produce other evidence, the witness or counsel for the witness may object on the record to the question or requirement and may state briefly and precisely the ground therefor. The witness and his counsel shall not otherwise object to or refuse to answer any question, and they shall not otherwise interrupt the oral examination.

(3) Any objections made under the rules in this part will be treated as continuing objections and preserved throughout the further course of the hearing without the necessity for repeating them as to any similar line of inquiry. Cumulative objections are unnecessary. Repetition of the grounds for any objection will not be allowed.

(4) Counsel for a witness may not, for any purpose or to any extent not allowed by paragraphs (b) (1) and (2) of this section, interrupt the examination of the witness by making any objections or statements on the record. Petitions challenging the Commission's authority to conduct the investigation or the sufficiency or legality of the subpoena or civil investigative demand must have been addressed to the Commission in advance of the hearing. Copies of such petitions may be filed with the presiding official or Commission investigator as part of the record of the investigation, but no arguments in support thereof will be allowed at the hearing.

(5) Following completion of the examination of a witness, counsel for the witness may on the record request the presiding official to permit the witness to clarify any of his answers which may need clarification in order that they may not be left equivocal or incomplete on the record. The granting or denial of such request shall be within the sole discretion of the presiding official.

(6) The presiding official shall take all necessary action to regulate the course to the hearing to avoid delay and to prevent or restrain disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language. Such official shall, for reasons stated on the record, immediately report to the Commission any instances where an attorney has refused to comply with his directions, or has been guilty of disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of the hearing. The Commission, acting pursuant to § 4.1(e) of this chapter, will thereupon take such further action, if any, as the circumstances warrant, including suspension or disbarment of the attorney from further practice before the Commission or exclusion from further participation in the particular investigation.

(18 U.S.C. 6002, 6004)

[32 FR 8446, June 13, 1967, as amended at 45 FR 36343, May 29, 1980; 45 FR 39244, June 10, 1980; 46 FR 26290, May 12, 1981; 50 FR 53304, Dec. 31, 1985]

§ 2.10 Depositions.

In investigations other than those conducted under Section 20 of the Federal Trade Commission Act, the Commission may order testimony to be taken by deposition at any stage of such investigation. Such depositions may be taken before any person having power to administer oaths who may be designated by the Commission. The testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed to by the deponent. Any person may be compelled to appear and be deposed and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence as provided in §§ 2.7 through 2.9.

[45 FR 36343, May 29, 1980, as amended at 50 FR 53304, Dec. 31, 1985]

§ 2.11 Orders requiring access.

(a) In investigations other than those conducted under section 20 of the Federal Trade Commission Act, the Commission may issue an order requiring any person, partnership or corporation being investigated to grant access to files for the purpose of examination and the right to copy any documentary evidence. The Directors, Deputy Directors and Assistant Directors of the Bureaus of Competition and Economics, the Director, Deputy Directors and Associate Directors of the Bureau of Consumer Protection, the Regional Directors, and Assistant Regional Directors of the Commission's regional offices, pursuant to delegation of authority by the Commission, without power of redelegation, are authorized, for good cause shown, to extend the time prescribed for compliance with orders requiring access issued during the investigation of any matter.

(b) Any petition to limit or quash an order requiring access shall be filed with the Secretary of the Commission within twenty (20) days after service of the order, or, if the date for compliance is less than twenty (20) days after service of the order, then before the return date. Such petition shall set forth all assertions of privilege or other factual and legal objections to the order requiring access, including all appropriate arguments, affidavits and other supporting documentation. All petitions to limit or quash orders requiring access shall be ruled upon by the Commission itself, but the above-designated Directors, Deputy Directors, Assistant Directors, Associate Directors, Regional Directors and Assistant Regional Directors are delegated, without power of redelegation, the authority to rule upon motions for extensions of time within which to file petitions to limit or quash orders requiring access.

(c) The timely filing of any petition to limit or quash such an order shall stay the requirement of compliance if the Commission has not ruled upon the motion by the date of compliance. If it rules on or subsequent to the date required for compliance and its ruling denies the petition in whole or in part, the Commission shall specify a new date of compliance.

(d) All petitions to limit or quash orders requiring access, and the Commission's responses thereto, are part of the public records of the Commission, except for information exempt from disclosure under § 4.10(a) of this chapter.

[46 FR 26290, May 12, 1981, and 48 FR 41375, Sept. 15, 1983]

§ 2.12 Reports.

(a) In investigations other than those covered by section 20 of the Federal Trade Commission Act the Commission may issue an order requiring a person, partnership, or corporation to file a report or answers in writing to specific questions relating to any matter under investigation, study or survey, or under any of the Commission's reporting programs.

(b) The Directors, Deputy Directors and Assistant Directors of the Bureaus of Competition and Economics, the Director, Deputy Directors and Associate Directors of the Bureau of Consumer Protection, and the Regional Directors and Assistant Regional Directors of the Commission's regional offices, pursuant to delegation of authority by the Commission, without power of redelegation, are authorized, for good cause shown, to extend the time prescribed for compliance with orders requiring reports or answers to questions issued during the investigation, study or survey of any matter or in connection with any of the Commission's reporting programs.

(c) Any petition to limit or quash an order requiring a report or answer to specific questions shall be filed with the Secretary of the Commission within twenty (20) days after service of the order, or, if the date for compliance is less than twenty (20) days after service of the order, then before the return date. Such petition shall set forth all assertions of privilege or other factual and legal objections to the order requiring a report or answer to specific questions, including all appropriate arguments, affidavits and other supporting documentation. All petitions to limit or quash orders requiring reports or answers to questions shall be ruled upon by the Commission itself, but the above-designated Directors, Deputy Directors, Assistant Directors, Associate Directors, Regional Directors and Assistant Regional Directors are delegated, without power of redelegation, the authority to rule upon motions for extensions of time within which to file petitions to limit or quash orders requiring reports or answers to questions.

(d) Except as otherwise provided by the Commission, the timely filing of any petition to limit or quash such an order shall stay the requirement of return on the portion challenged if the Commission has not ruled upon the petition by the return date. If it rules on or subsequent to the return date and its ruling denies the petition in whole or in part, the Commission shall specify a new return date.

(e) All petitions to limit or quash orders requiring a report or answers to specific questions, and the Commission's responses thereto, are part of the public records of the Commission, except for information exempt from disclosure under § 4.10(a) of this chapter.

[41 FR 54485, Dec. 14, 1976, and 45 FR 36343, May 29, 1980, as amended at 46 FR 26290, May 12, 1981; 48 FR 41375, Sept. 15, 1983; 50 FR 53304, Dec. 31, 1985]

§ 2.13 Noncompliance with compulsory processes.

(a) In cases of failure to comply with Commission compulsory processes, appropriate action may be initiated by the Commission or the Attorney General, including actions for enforcement, forfeiture, or penalties or criminal actions.

(b) The General Counsel, pursuant to delegation of authority by the Commission, without power of redelegation, is authorized:

(1) To institute, on behalf of the Commission, an enforcement proceeding in connection with the failure or refusal of a person, partnership, or corporation to comply with, or to obey, a subpoena, or civil investigative demand if the return date or any extension thereof has passed;

(2) To approve and have prepared and issued, in the name of the Commission when deemed appropriate by the General Counsel, a notice of default in connection with the failure of a person, partnership, or corporation to timely file a report pursuant to section 6(b) of the Federal Trade Commission Act, if the return date or any extension thereof has passed;

(3) To institute, on behalf of the Commission, an enforcement proceeding and to request, on behalf of the Commission, the institution, when deemed appropriate by the General Counsel, of a civil action in connection with the failure of a person, partnership, or corporation to timely file a report pursuant to an order under section 6(b) of the Federal Trade Commission Act, if the return date or any extension thereof has passed; and

(4) To seek civil contempt in cases where a court order enforcing compulsory process has been violated.

[41 FR 54485, Dec. 14, 1976, as amended at 45 FR 39244, June 10, 1980; 50 FR 53304, Dec. 31, 1985]

§ 2.14 Disposition.

(a) When the facts disclosed by an investigation indicate that corrective action is warranted, and the matter is not subject to a consent settlement pursuant to Subpart C of this part, further proceedings may be instituted pursuant to the provisions of Part 3 of this chapter.

(b) When the facts disclosed by an investigation indicate that corrective action is not necessary or warranted in the public interest, the investigational file will be closed. The matter may be further investigated at any time if circumstances so warrant.

(c) The Commission has delegated to the Director, Deputy Directors, and Assistant Directors of the Bureau of Competition, the Director, Deputy Directors and Associate Directors of the Bureau of Consumer Protection, and Regional Directors, without power of redelegation, limited authority to close investigations.

[32 FR 8446, June 13, 1967, as amended at 42 FR 42195, Aug. 22, 1977; 48 FR 41375, Sept. 15, 1983; 50 FR 53304, Dec. 31, 1985]

§ 2.15 Orders requiring witnesses to testify or provide other information and granting immunity.

(a) The Bureau Director, Deputy Directors, and Assistant Directors in the Bureaus of Competition and Economics, the Bureau Director, Deputy Directors and Associate Directors of the Bureau of Consumer Protection, Regional Directors and Assistant Regional Directors are hereby authorized to request, through the Commission's liaison officer, approval from the Attorney General for the issuance of an order requiring a witness to testify or provide other information granting immunity under Title 18, section 6002, of the United States Code.

(b) The Commission retains the right to review the exercise of any of the functions delegated under paragraph (a) of this section. Appeals to the Commission from an order requiring a witness to testify or provide other information will be entertained by the Commission only upon a showing that a substantial question is involved, the determination of which is essential to serve the interests of justice. Such appeals shall be made on the record and shall be in the form of a brief not to exceed fifteen (15) pages in length and shall be filed within five (5) days after notice of the complained of action. Answer to any such appeal may be filed within five (5) days after service of the appeal brief. The appeal shall not operate to suspend the hearing unless otherwise ordered by the presiding official or the Commission.

(18 U.S.C. 6002, 6004)

[37 FR 5016, Mar. 9, 1972, as amended at 48 FR 41375, Sept. 15, 1983]

§ 2.16 Custodians.

(a) *Designation.* The Commission shall designate a custodian and one or more deputy custodians for material to be delivered pursuant to compulsory process in a investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission. The custodian shall have the powers and duties prescribed by section 21 of the FTC Act. Deputy custodians may perform all of the duties assigned to custodians. The appropriate Bureau Directors, Deputy Directors, Associate Directors in the Bureau of Consumer Protection, Assistant Directors in the Bureau of Competition, Regional Directors or Assistant Regional Directors shall take the action required by section 21(b)(7) of the FTC Act if it is necessary to replace a custodian or deputy custodian.

(b) *Copying of custodial documents.* The custodian designated pursuant to Section 21 of the Federal Trade Commission Act (subject to the general supervision of the Executive Director) may, from among the material submitted, select the material the copying of which is necessary or appropriate for the official use of the Commission, and shall determine, the number of copies of any such material that are to be reproduced. Copies of material in the physical possession of the custodian may be reproduced by or under the authority of an employee of the Commission designated by the custodian.

(c) Material produced pursuant to the Federal Trade Commission Act, while in the custody of the custodian, shall be for the official use of the Commission in accordance with the Act; but such material shall upon reasonable notice to the custodian be made available for examination by the person who produced such material, or his duly authorized representative, during regular office hours established for the Commission.

[45 FR 36343, May 29, 1980, as amended at 46 FR 26291, May 12, 1981; 48 FR 41376, Sept. 15, 1983; 50 FR 53305, Dec. 31, 1985]

Subpart B—[Reserved]

Subpart C—Consent Order Procedure

§ 2.31 Opportunity to submit a proposed consent order.

(a) Where time, the nature of the proceeding, and the public interest permit, any individual, partnership, or corporation being investigated shall be afforded the opportunity to submit through the operating Bureau or Regional Office having responsibility in the matter a proposal for disposition of the matter in the form of a consent order agreement executed by the party being investigated and complying with the requirements of § 2.32, for consideration by the Commission in connection with a proposed complaint submitted by the Commission's staff.

(b) After a complaint has been issued, the consent order procedure described in this part will not be available except as provided in § 3.25(b).

[40 FR 15235, Apr. 4, 1975]

§ 2.32 Agreement.

Every agreement shall contain, in addition to an appropriate order, either an admission of the proposed findings of fact and conclusions of law submitted simultaneously by the Commission's staff or an admission of all jurisdictional facts and an express waiver of the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law. In addition, every agreement shall contain waivers of further procedural steps and of all rights to seek judicial review or otherwise to challenge or contest the validity of the order. The agreement shall also contain provisions that the complaint may be used in construing the terms of the order, and that no agreement, understanding, representation, or interpretation not contained in the order or the aforementioned agreement may be used to vary or to contradict the terms of the order; that the order shall have the same force and effect and may be altered, modified, or set aside in the same manner provided by statute for other orders; that the order shall become final upon service; that the agreement shall not become a part of the public record unless and until it is accepted by the Commission; and, if the agreement is accepted, that the Commission will place the order contained therein on the public record for a period of sixty (60) days for the receipt and consideration of comments or views from any interested person; and that the Commission thereafter may either withdraw its acceptance of the agreement and so notify the other party, in which event it will take such other action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding. In addition, in appropriate circumstances the agreement may contain a statement that the signing thereof is for settlement purposes only and does not constitute an admission by any party that the law has been violated as alleged in the complaint.

[42 FR 3300, Jan. 18, 1977, as amended at 50 FR 53305, Dec. 31, 1985]

§ 2.33 Compliance procedure.

The Commission may in its discretion require that a proposed agreement containing an order to cease and desist be accompanied by an initial report signed by the respondent setting forth in precise detail the manner in which the respondent will comply with the order when and if entered. Such report will not become part of the public record unless and until the accompanying agreement and order are accepted by the Commission. At the time any such report is submitted a respondent may request confidentiality for any portion thereof with a precise showing of justification therefor, and the Commission with due regard to statutory restrictions, its rules, and the public interest will act upon such request.

[40 FR 15235, Apr. 4, 1975]

§ 2.34 Disposition.

Upon receiving an executed agreement conforming with the requirements of § 2.32, the Commission may:

Accept it; reject it and issue its complaint; or take such other action as it may deem appropriate. If an agreement is accepted, the Commission will place the order contained therein and any initial report of compliance submitted pursuant to § 2.33 on the public record, and at the same time, will make available an explanation of the provisions of the order and the relief to be obtained thereby, and any other information which it deems helpful in assisting interested persons to understand the terms of the order. The Commission will publish the agreement, order and explanation in the FEDERAL REGISTER. For a period of sixty (60) days after placement of the order on the public record and issuance of the statement, the Commission will receive and consider any comments or views concerning the order that may be filed by any interested person. Thereafter, the Commission may either withdraw its acceptance of the agreement and so notify the other party, in which event it will take such other action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

[43 FR 51758, Nov. 7, 1978]

Subpart D—Reports of Compliance

§ 2.41 Reports of compliance.

(a) In every proceeding in which the Commission has issued an order, pursuant to the provisions of section 5 of the Federal Trade Commission Act or section 11 of the Clayton Act, as amended, and except as otherwise specifically provided in any such order, each respondent named in such order shall file with the Commission, within sixty (60) days after service thereof, or within such other time as may be provided by the order or the rules in this chapter, a report in writing, signed by the respondent, setting forth in detail the manner and form of his compliance with the order, and shall thereafter file with the Commission such further signed, written reports of compliance as it may require. Reports of compliance shall be under oath if so requested. Where the order prohibits the use of a false advertisement of a food, drug, device, or cosmetic which may be injurious to health because of results from its use under the conditions prescribed in the advertisement, or under such conditions as are customary or usual, or if the use of such advertisement is with intent to defraud or mislead, or in any other case where the circumstances so warrant, the order may provide for an interim report stating whether and how respondents intend to comply to be filed within ten (10) days after service of the order. When court review of an order of the Commission is pending, the respondent shall file only such reports of compliance as the court may require. Thereafter, the time for filing report of compliance shall begin to run de novo from the final judicial determination, except that if no petition for certiorari has been filed following affirmance of the order of the Commission by a court of appeals, the compliance report shall be due the day following the date on which the time expires for the filing of such petition. The Commission will review such reports of compliance and may advise each respondent whether the actions set forth therein evidence compliance with the Commission's order. The Commission may, however, institute proceedings, including certification of facts to the Attorney General pursuant to the provisions of section 5(1) of the Federal Trade Commission Act (15 U.S.C. 45(1)) and section 11(1) of the Clayton Act, as amended (15 U.S.C. 21(1)), to enforce compliance with an order, without advising a respondent whether the actions set forth in a report of compliance evidence compliance with the Commission's order or without prior notice of any kind to a respondent.

(b) The Commission has delegated to the Director and Deputy Directors of the Bureaus of Competition and Consumer Protection, without power of redelegation, the authority to approve compliance reports, reject compliance reports, and to close compliance investigations. This delegation does not apply to compliance with orders involving section 7 of the Clayton Act, to any matter which has received previous Commission consideration as to compliance or in which the Commission or any Commissioner has expressed an interest, any matter proposed to be closed by reason of expense of investigation or testing, or any matter involving substantial questions as to the public interest, Commission policy or statutory construction, in each of which type of case a report with recommendation will be made to the Commission. The approvals, rejections, and closings shall not be effective until the file relating to the subject matter has been transmitted to the Secretary and he shall have advised the Commission of the Bureau Director's or Deputy Director's determination and, within five (5) working days after receiving notice of the determination from the Secretary, no Commissioner has directed that the matter be placed on a meeting agenda or otherwise stayed for further consideration. Thereupon, the Secretary shall enter upon the records of the Commission the determination of the matter and take such other action as is required.

(c) The Commission has delegated to the Director, Deputy Directors, and Assistant Directors of the Bureau of Competition and to the Director, Deputy Directors, and Associate Directors of the Bureau of Consumer Protection, and to the Regional Directors, the authority, for good cause shown, to extend the time within which reports of compliance with orders to cease and desist may be filed. It is to be noted, however, that an extension of time within which a report of compliance may be filed, or the filing of a report which does not evidence full compliance with the order, does not in any circumstances suspend or relieve a respondent from his obligation under the law with respect to compliance with such order. An order of the Commission to cease and desist becomes final on the date and under the conditions provided in the Federal Trade Commission Act and the Clayton Act. Any person, partnership or corporation against which an order to cease and desist has been issued who is not in full compliance with such order on and after the date provided in these statutes for the order to become final is in violation of such order and is subject to an immediate action for civil penalties. The authority under this subsection may not be redelegated, except that the Associate Director for Enforcement in the Bureau of Consumer Protection and the Assistant Director for Compliance in the Bureau of Competition may each name a designee under this subsection.

(d) Any respondent subject to a Commission order may request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance with such order. The request for advice should be submitted in writing to the Secretary of the Commission and should include full and complete information regarding the proposed course of action. On the basis of the facts submitted, as well as other information available to the Commission, the Commission will inform the respondent whether or not the proposed course of action, if pursued, would constitute compliance with its order. A request ordinarily will be considered inappropriate for such advice:

(1) Where the course of action is already being followed by the requesting party;

(2) Where the same or substantially the same course of action is under investigation or is or has been the subject of a current proceeding, order, or decree initiated or obtained by the Commission or another governmental agency; or

(3) Where the proposed course of action or its effects may be such that an informed decision thereon cannot be made or could be made only after extensive investigation, clinical study, testing or collateral inquiry.

Furthermore, the filing of a request for advice under this paragraph does not in any circumstances suspend or relieve a respondent from his obligation under the law with respect to his compliance with the order. He must in any event be in full compliance on and after the date the order becomes final as prescribed by statute referred to in paragraph (b) of this section. Advice to respondents under this paragraph will be published by the Commission in the same manner and subject to the same restrictions and considerations as advisory opinions under § 1.4 of this chapter.

(e) The Commission may at any time reconsider its approval of any report of compliance or any advice given under this section and, where the public interest requires, rescind or revoke its prior approval or advice. In such event the respondent will be given notice of the Commission's intent to revoke or rescind and will be given an opportunity to submit its views to the Commission. The Commission will not proceed against a respondent for violation of an order with respect to any action which was taken in good faith reliance upon the Commission's approval or advice under this section, where all relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval.

(f) All applications for approval of proposed divestitures, acquisitions, or similar transactions subject to Commission review under outstanding orders, together with supporting materials, will be placed on the public record as soon after they are received as circumstances permit, except for information for which confidential classification has been requested, with a showing of justification therefor, and which the Commission, with due regard to statutory restrictions, its rules, and the public interest, has determined should not be made public. Within thirty (30) days after such requests and materials are placed on the public record, any person may file formal written objections or comments with the Secretary of the Commission. Such objections or comments shall be placed on the public record except for information for which confidentiality has been requested, with a showing of justification therefor, and which the Commission with due regard to statutory restrictions, its rules, and the public interest, has determined should not be made public. Additionally, any communications, written or oral, concerning such proposed transactions, received by any individual member of the Commission, or by any employee involved in the decisional process, will be placed on the public record immediately after their receipt. In the case of an oral communication, the member or employee shall immediately furnish the Commission with a memorandum setting forth the full contents of such communication and the circumstances thereof, and such memorandum will immediately be placed on the public record. All responses to applications for approval of proposed divestitures, acquisitions, or similar transactions subject to Commission review under outstanding orders, together with a statement of supporting reasons, will be published when made.

[32 FR 8449, June 13, 1967, as amended at 35 FR 13726, Aug. 28, 1970; 36 FR 9008, May 18, 1971; 37 FR 5610, Mar. 17, 1972; 40 FR 761, Jan. 3, 1975; 40 FR 15234, Apr. 4, 1975; 42 FR 13540, Mar. 11, 1977; 43 FR 754, Jan. 4, 1978; 43 FR 6580, Feb. 15, 1978. Redesignated at 44 FR 40637, July 12, 1979, and amended at 44 FR 47766, Aug. 14, 1979; 48 FR 41376, Sept. 15, 1983; 50 FR 53305, Dec. 31, 1985]

Subpart E—Requests to Reopen

§ 2.51 Requests to reopen.

(a) *Scope.* Any person, partnership, or corporation subject to a Commission decision containing a rule or order which has become effective, or an order to cease and desist which has become final, may file with the Secretary a request that the Commission reopen the proceeding to consider whether the rule or order, including any affirmative relief provision contained therein, should be altered, modified, or set aside in whole or in part.

(b) *Contents.* A request under this section shall contain a satisfactory showing that changed conditions of law or fact require the rule or order to be altered, modified, or set aside, in whole or in part, or that the public interest so requires. This requirement shall not be deemed satisfied if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modifications of the rule or order.

(c) *Opportunity for public comment.* A request under this section shall be placed on the public record except for material exempt from public disclosure under rule 4.10(a). Unless the Commission determines that earlier disposition is necessary, the request shall remain on the public record for thirty (30) days after a press release on the request is issued. Bureau Directors are authorized to publish a notice in the FEDERAL REGISTER announcing the receipt of a request to reopen at their discretion. The public is invited to comment on the request while it is on the public record.

(d) *Determination.* After the period for public comments on a request under this section has expired and no later than one hundred and twenty (120) days after the date of the filing of the request, the Commission shall determine whether the request complies with paragraph (b) of this section and whether the proceeding shall be reopened and the rule or order should be altered, modified, or set aside as requested. In doing so, the Commission may, in its discretion, issue an order reopening the proceeding and modifying the rule or order as requested, issue an order to show cause pursuant to § 3.72, or take such other action as is appropriate: *Provided, however,* That any action under § 3.72 or otherwise shall be concluded within the specified 120-day period.

(Sec. 6(g), 38 Stat. 721 (15 U.S.C. 46(g)); 80 Stat. 383, as amended, 81 Stat. 54 (5 U.S.C. 552))

[45 FR 36344, May 29, 1980, as amended at 46 FR 26291, May 12, 1981; 47 FR 33251, Aug. 2, 1982; 50 FR 53305, Dec. 31, 1985]

PART 3—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

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AUTHORITY: Sec. 6, 38 Stat. 721 (15 U.S.C. 46), unless otherwise noted.

SOURCE: 32 FR 8449, June 13, 1967, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes affecting Part 3 appear at 37 FR 22611, Oct. 20, 1972, and 50 FR 53305, Dec. 31, 1985.

Subpart A—Scope of Rules; Nature of Adjudicative Proceedings

§ 3.1 Scope of the rules in this part.

The rules in this part govern procedure in adjudicative proceedings. It is the policy of the Commission that, to the extent practicable and consistent with requirements of law, such proceedings shall be conducted expeditiously. In the conduct of such proceedings the Administrative Law Judge and counsel for all parties shall make every effort at each state of a proceeding to avoid delay.

§ 3.2 Nature of adjudicative proceedings.

Adjudicative proceedings are those formal proceedings conducted under one or more of the statutes administered by the Commission which are required by statute to be determined on the record after opportunity for an agency hearing. The term includes hearings upon objections to orders relating to the promulgation, amendment, or repeal of rules under sections 4, 5 and 6 of the Fair Packaging and Labeling Act and proceedings for the assessment of civil penalties pursuant to § 1.94 of this chapter. It does not include other proceedings such as negotiations for the entry of consent orders; investigational hearings as distinguished from proceedings after the issuance of a complaint; requests for extensions of time to comply with final orders or other proceedings involving compliance with final orders; proceedings for the promulgation of industry guides or trade regulation rules; proceedings for fixing quantity limits under section 2(a) of the Clayton Act; investigations under section 5 of the Export Trade Act; rulemaking proceedings under the Fair Packaging and Labeling Act up to the time when the Commission determines under § 1.26(g) of this chapter that objections sufficient to warrant the holding of a public hearing have been filed; or the promulgation of substantive rules and regulations, determinations of classes of products exempted from statutory requirements, the establishment of name guides, or inspections and industry counseling, under sections 4(d) and 6(a) of the Wool Products Labeling Act of 1939, sections 7, 8(b), and 8(c) of the Fur Products Labeling Act, and sections 7(c), 7(d), and 12(b) of the Textile Fiber Products Identification Act.

[45 FR 67319, Oct. 10, 1980]

Subpart B—Pleadings

§ 3.11 Commencement of proceedings.

(a) *Complaint.* Except as provided in § 3.13, an adjudicative proceeding is commenced when an affirmative vote is taken by the Commission to issue a complaint.

(b) *Form of complaint.* The Commission's complaint shall contain the following:

(1) Recital of the legal authority and jurisdiction for institution of the proceeding, with specific designation of the statutory provisions alleged to have been violated;

(2) A clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law;

(3) Where practical, a form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint; and

(4) Notice of the time and place for hearing, the time to be at least thirty (30) days after service of the complaint.

(c) *Motion for more definite statement.* Where the respondent makes a reasonable showing that it cannot frame a responsive answer based on the allegations contained in the complaint, the respondent may move for a more definite statement of the charges against it before filing an answer. Such a motion shall be filed within ten (10) days after service of the complaint and shall point out the defects complained of and the details desired.

[32 FR 8449, June 13, 1967, as amended at 43 FR 11978, Mar. 23, 1978; 50 FR 53305, Dec. 31, 1985]

§ 3.12 Answer.

(a) *Time for filing.* A respondent shall have thirty (30) days after service of the complaint within which to file an answer thereto: *Provided, however,* That the filing of a motion for a more definite statement of the charges shall alter this period of time as follows, unless a different time is fixed by the Administrative Law Judge:

(1) If the motion is denied, the answer shall be filed within ten (10) days after service of the order of denial or thirty (30) days after service of the complaint, whichever is later; (2) if the motion is granted, in whole or in part, the more definite statement of the charges shall be filed within ten (10) days after service of the order granting the motion and the answer shall be filed within ten (10) days after service of the more definite statement of the charges.

(b) *Content of answer.* An answer shall conform to the following:

(1) *If allegations of complaint are contested.* An answer in which the allegations of a complaint are contested shall contain:

(i) A concise statement of the facts constituting each ground of defense;

(ii) Specific admission, denial, or explanation of each fact alleged in the complaint or, if the respondent is without knowledge thereof, a statement to that effect. Allegations of a complaint not thus answered shall be deemed to have been admitted.

(2) *If allegations of complaint are admitted.* If the respondent elects not to contest the allegations of fact set forth in the complaint, his answer shall consist of a statement that he admits all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such an answer, the respondent may, however, reserve the right to submit proposed findings and conclusions under § 3.46 and the right to appeal the initial decision to the Commission under § 3.52.

(c) *Default.* Failure of the respondent to file an answer within the time provided shall be deemed to constitute a waiver of the respondent's right to appear and contest the allegations of the complaint and to authorize the Administrative Law Judge, without further notice to the respondent, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

[32 FR 8449, June 13, 1967, as amended at 50 FR 53305, Dec. 31, 1985]

§ 3.13 Adjudicative hearing on issues arising in rulemaking proceedings under the Fair Packaging and Labeling Act.

(a) *Notice of hearing.* When the Commission, acting under § 1.26(g) of this chapter, determines that objections which have been filed are sufficient to warrant the holding of an adjudicative hearing in rulemaking proceedings under the Fair Packaging and Labeling Act, or when the Commission otherwise determines that the holding of such a hearing would be in the public interest, a hearing will be held before an Administrative Law Judge for the purpose of receiving evidence relevant and material to the issues raised by such objections or other issues specified by the Commission. In such case the Commission will publish a notice in the FEDERAL REGISTER containing a statement of:

(1) The provisions of the rule or order to which objections have been filed;

(2) The issues raised by the objections or the issues on which the Commission wishes to receive evidence;

(3) The time and place for hearing, the time to be at least thirty (30) days after publication of the notice; and

(4) The time within which, and the conditions under which, any person who petitioned for issuance, amendment, or repeal of the rule or order, or any person who filed objections sufficient to warrant the holding of the hearing, or any other interested person, may file notice of intention to participate in the proceeding.

(b) *Parties.* Any person who petitions for issuance, amendment, or repeal of a rule or order, and any person who files objections sufficient to warrant the holding of a hearing, and who files timely notice of intention to participate, shall be regarded as a party and shall be individually served with any pleadings filed in the proceeding. Upon written application to the Administrative Law Judge and a showing of good cause, any interested person may be designated by the Administrative Law Judge as a party.

[32 FR 8449, June 13, 1967, as amended at 40 FR 33969, Aug. 13, 1975]

§ 3.14 Intervention.

(a) Any individual, partnership, unincorporated association, or corporation desiring to intervene in an adjudicative proceeding shall make written application in the form of a motion setting forth the basis therefor. Such application shall have attached to it a certificate showing service thereof upon each party to the proceeding in accordance with the provisions of § 4.4(b) of this chapter. A similar certificate shall be attached to the answer filed by any party, other than counsel in support of the complaint, showing service of such answer upon the applicant. The Administrative Law Judge or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper.

(b) In an adjudicative proceeding where the complaint states that divestiture relief is contemplated, the labor organization[s] representing employees of the respondent[s] may intervene as a matter of right. Applications for such intervention are to be made in accordance with the procedures set forth in paragraph (a) of this section and must be filed within 60 days of the issuance of the complaint. Intervention as a matter of right shall be limited to the issue of the effect, if any, of proposed remedies on employment, with full rights of participation in the proceeding concerning this issue. This subsection does not affect a labor organization's ability to petition for leave to intervene pursuant to § 3.14(a).

[32 FR 8449, June 13, 1967, as amended at 46 FR 20979, Apr. 8, 1981]

§ 3.15 Amendments and supplemental pleadings.

(a) *Amendments*—(1) *By leave.* If and whenever determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to pleadings or notice of hearing: *Provided, however,* That a motion for amendment of a complaint or notice may be allowed by the Administrative Law Judge only if the amendment is reasonably within the scope of the original complaint or notice. Motions for other amendments of complaints or notices shall be certified to the Commission.

(2) *Conformance to evidence.* When issues not raised by the pleadings or notice of hearing but reasonably within the scope of the original complaint or notice of hearing are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings or notice of hearing; and such amendments of the pleadings or notice as may be necessary to make them conform to the evidence and to raise such issues shall be allowed at any time.

(b) *Supplemental pleadings.* The Administrative Law Judge may, upon reasonable notice and such terms as are just, permit service of a supplemental pleading or notice setting forth transactions, occurrences, or events which have happened since the date of the pleading or notice sought to be supplemented and which are relevant to any of the issues involved.

Subpart C—Prehearing Procedures; Motions; Interlocutory Appeals; Summary Decisions

§ 3.21 Prehearing procedures.

(a) *Nonbinding statements.* Not later than ten days after the answer is filed by the last answering respondent, complaint counsel shall file a nonbinding statement setting forth in detail the theory of the case, the issues to be tried, and what complaint counsel expect their evidence to prove. Not later than ten days after complaint counsel's statement is served, each respondent shall file a nonbinding statement setting forth in detail the respondent's theory of the defense, the issues to be tried, and what the respondent expects its evidence to prove. Such statements may be modified upon completion of discovery or at such other times as the Administrative Law Judge may direct.

(b) *Scheduling conference.* Not later than ten days after all respondents have filed the nonbinding statement required by paragraph (a) of this section, the Administrative Law Judge shall hold a scheduling conference. At the scheduling conference, counsel for the parties shall be prepared to address their factual and legal theories, potential stipulations of law, fact, or admissibility of evidence, a schedule of proceedings, possible limitations on discovery, and other possible agreements or steps that may aid in the orderly and expeditious disposition of the proceeding.

(c) *Prehearing scheduling order.* Not later than fourteen days after the scheduling conference, the Administrative Law Judge shall enter an order that sets forth the results of the conference and establishes a schedule of proceedings, including a plan of discovery and dates for the submission and hearing of motions. The schedule shall provide for the commencement of the evidentiary hearings within six months after entry of the order, unless the Administrative Law Judge determines that a later date is necessary because of the complexity of the case or circumstances beyond the conrol of the parties. The Administrative Law Judge may modify this order for good casue shown.

(d) *Additional prehearing conferences and orders.* The Administrative Law Judge may hold additional prehearing conferences or enter additional orders for the purpose of aiding in the orderly and expeditious disposition of a proceeding.

(e) *Public access and reporting.* Prehearing conferences shall be public unless the Administrative Law Judge determines in his or her discretion that the conference (or any part thereof) shall be closed to the public. The Administrative Law Judge shall have discretion to determine whether a prehearing conference shall be stenographically reported.

[50 FR 41487, Oct. 11, 1985]

§ 3.22 Motions.

(a) *Presentation and Disposition.* During the time a proceeding is before an Administrative Law Judge, all motions therein, except those filed under § 3.42(g) or § 4.17, shall be addressed to the Administrative Law Judge, and if within his authority shall be ruled upon by him. Any motion upon which the Administrative Law Judge has no authority to rule shall be certified by him to the Commission, with his recommendation where he deems it appropriate. Such recommendation may contain a proposed disposition of the motion or other relevant comments or observations. Where the Commission believes that a recommendation or an amplification thereupon would assist it in its deliberations, it may order the Administrative Law Judge to file a recommendation. All written motions shall be filed with the Secretary of the Commission and all motions addressed to the Commission shall be in writing.

(b) *Content.* All written motions shall state the particular order, ruling, or action desired and the grounds therefor.

(c) *Answers.* Within ten (10) days after service of any written motion, or within such longer or shorter time as may be designated by the Administrative Law Judge or the Commission, the opposing party shall answer or shall be deemed to have consented to the granting of the relief asked for in the motion. The moving party shall have no right to reply, except as permitted by the Administrative Law Judge or the Commission.

(d) *Motions for extensions.* As a matter of discretion, the Administrative Law Judge or the Commission may waive the requirements of this section as to motions for extensions of time, and may rule upon such motions ex parte.

(e) *Rulings on motions for dismissal.* When a motion to dismiss a complaint or for other relief is granted with the result that the proceeding before the Administrative Law Judge is terminated, the Administrative Law Judge shall file an initial decision in accordance with the provisions of § 3.51. If such a motion is granted as to all charges of the complaint in regard to some, but not all, of the respondents, or is granted as to any part of the charges in regard to any or all of the respondents, the Administrative Law Judge shall enter his ruling on the record and take it into account in his initial decision. When a motion to dismiss is made at the close of the evidence offered in support of the complaint based upon an alleged failure to establish a prima facie case, the Administrative Law Judge may, if he so elects, defer ruling thereon until the close of the case for the reception of evidence.

(f) *Statement.* Each motion to quash filed pursuant to Rule 3.34(c) or 3.37(b), each motion to compel or to determine sufficiency pursuant to Rule 3.38(a), each motion for sanctions pursuant to Rule 3.38(b), and each motion for enforcement pursuant to Rule 3.38(c), shall be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. If some of the matters in controversy have been resolved by agreement, the statement shall specify the matters so resolved and the matters remaining unresolved. The statement shall recite the date, time, and place of each such conference between counsel, and the names of all parties participating in each such conference. Unless otherwise ordered by the Administrative Law Judge, the statement required by this rule must be filed only with the first motion concerning compliance with the discovery demand at issue.

[32 FR 8449, June 13, 1967, as amended at 46 FR 45750, Sept. 15, 1981; 50 FR 42672, Oct. 22, 1985]

§ 3.23 Interlocutory appeals.

(a) *Appeals without a determination by the Administrative Law Judge.* The Commission may, in its discretion, entertain interlocutory appeals where a ruling of the Administrative Law Judge:

(1) Requires the disclosure of records of the Commission or another governmental agency or the appearance of an official or employee of the Commission or another governmental agency pursuant to § 3.36, if such appeal is based solely on a claim of privilege: *Provided,* that The Administrative Law Judge shall stay until further order of the Commission the effectiveness of any ruling, whether or not appeal is sought, that requires the disclosure of nonpublic Commission minutes, Commissioner circulations, or similar documents prepared by the Commission, individual Commissioner, or the Office of the General Counsel;

(2) Suspends an attorney from participation in a particular proceeding pursuant to § 3.42(d); or

(3) Grants or denies an application for intervention pursuant to the provisions of § 3.14.

Appeal from such rulings may be sought by filing with the Commission an application for review, not to exceed fifteen (15) pages exclusive of those attachments required below, within five (5) days after notice of the Administrative Law Judge's ruling. Answer thereto may be filed within five (5) days after service of the application for review. The application for review should specify the person or party taking the appeal; should attach the ruling or part thereof from which appeal is being taken and any other portions of the record on which the moving party relies; and should specify under which provisions hereof review is being sought. The Commission upon its own motion may enter an order staying the return date of an order issued by the Administrative Law Judge pursuant to § 3.36 or placing the matter on the Commission's docket for review. Any order placing the matter on the Commission's docket for review will set forth the scope of the review and the issues which will be considered and will make provision for the filing of briefs if deemed appropriate by the Commission.

(b) *Appeals upon a determination by the Administrative Law Judge.* Except as provided in paragraph (a) of this section, applications for review of a ruling by the Administrative Law Judge may be allowed only upon request made to the Adminstrative Law Judge and a determination by the Administrative Law Judge in writing, with justification in support thereof, that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy. Applications for review in writing may be filed, not to exceed fifteen (15) pages exclusive of those attachments required below, within five (5) days after notice of the Administrative Law Judge's determination. Additionally, the moving party is required to attach the ruling or part thereof from which appeal is being taken and any other portions of the record on which the moving party is relying. Answer thereto may be filed within five (5) days after service of the application for review. The Commission may thereupon, in its discretion, permit an appeal. Commission review, if permitted, will be confined to the application for review and answer thereto, without oral argument or further briefs, unless otherwise ordered by the Commission.

(c) *Proceedings not stayed.* Application for review and appeal hereunder shall not stay proceedings before the Administrative Law Judge unless the Judge or the Commission shall so order.

[37 FR 5608, Mar. 17, 1972, as amended at 42 FR 31591, June 22, 1977; 42 FR 33025, June 29, 1977; 43 FR 56902 Dec. 5, 1978; 50 FR 53305, Dec. 31, 1985]

§ 3.24 Summary decisions.

(a) *Procedure.* (1) Any party to an adjudicatory proceeding may move with or without supporting affidavits for a summary decision in the party's favor upon all or any part of the issues being adjudicated. Counsel in support of the complaint may so move at any time after thirty (30) days following issuance of the complaint and any party respondent may so move at any time after issuance of the complaint. Any such motion by any party, however, must be filed at least twenty (20) days before the date fixed for the adjudicatory hearing.

(2) Any other party may, within ten (10) days after service of the motion, file opposing affidavits. The Administrative Law Judge may, in his discretion, set the matter for oral argument and call for the submission of briefs or memoranda. The decision sought by the moving party shall be rendered within thirty (30) days if the pleadings and any depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law. Any such decision shall constitute the initial decision of the Administrative Law Judge. A summary decision, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the nature and extent of relief.

(3) Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The Administrative Law Judge may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary decision is made and supported as provided in this rule, a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial. If no such response is filed, summary decision, if appropriate, shall be rendered.

(4) Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the Administrative Law Judge may refuse the application for summary decision or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is appropriate and a determination to that effect shall be made a matter of record.

(5) If on motion under this rule a summary decision is not rendered upon the whole case or for all the relief asked and a trial is necessary, the Administrative Law Judge shall make an order specifying the facts

that appear without substantial controversy and directing further proceedings in the action. The facts so specified shall be deemed established.

(b) *Affidavits filed in bad faith.* (1) Should it appear to the satisfaction of the Administrative Law Judge at any time that any of the affidavits presented pursuant to this rule are presented in bad faith, or solely for the purpose of delay, or are patently frivolous, the Administrative Law Judge shall enter a determination to that effect upon the record.

(2) If upon consideration of all relevant facts attending the submission of any affidavit covered by paragraph (b)(1) of this section, the Administrative Law Judge concludes that action by him to suspend or remove an attorney from the case is warranted, he shall take action as specified in § 3.42(d). If the Administrative Law Judge concludes, upon consideration of all the relevant facts attending the submission of any affidavit covered by paragraph (b) (1) of this section, that the matter should be certified to the Commission for consideration of disciplinary action against an attorney, including reprimand, suspension or disbarment, the examiner shall certify the matter, with his findings and recommendations, to the Commission for its consideration of disciplinary action in the manner provided by the Commission's rules.

[35 FR 5007, Mar. 24, 1970, as amended at 50 FR 53305, Dec. 31, 1985]

§ 3.25 Consent agreement settlements.

(a) The Administrative Law Judge may, in his discretion and without suspension of prehearing procedures, hold conferences for the purpose of supervising negotiations for settlement of the case by way of consent agreement.

(b) A proposal to settle a matter in adjudication by consent agreement shall be submitted by way of a motion to withdraw the matter from adjudication for the purpose of considering the proposed consent agreement. Any such motion shall be accompanied by a consent agreement containing a proposed order executed by one or more respondents and conforming to the requirements of § 2.32; the consent agreement itself, however, shall not be placed on the public record unless and until it is accepted by the Commission as provided herein.

(c) If the agreement accompanying the motion has also been executed by complaint counsel, including the appropriate Bureau Director, the Secretary shall issue an order withdrawing the matter from adjudication with respect to those respondents signing the proposed consent agreement, and all proceedings before the Administrative Law Judge shall be stayed with respect to such respondents, pending a determination by the Commission pursuant to paragraph (f) of this section.

(d) If the agreement accompanying the motion has not been executed by complaint counsel, the Administrative Law Judge may certify the matter to the Commission together with his recommendation if he determines, in writing, that there is a likelihood of settlement. The filing of a motion to withdraw a matter from adjudication under this subsection and certification thereof to the Commission shall not stay proceedings before the Administrative Law Judge unless the Administrative Law Judge or the Commission shall so order. Upon certification of a motion to withdraw a matter from adjudication pursuant to this subsection, the Commission may, if it is satisfied that there is a likelihood of settlement, issue an order withdrawing the matter from adjudication for the purpose of considering the proposed consent agreement.

(e) If a matter is withdrawn from adjudication pursuant to paragraphs (c) or (d) of this section, the Commission will treat the matter as being in a nonadjudicative status with respect to those respondents signing the proposed consent agreement.

(f) After the matter has been withdrawn from adjudication, the Commission may: (1) Accept the agreement, (2) reject it and return the matter to adjudication for further proceedings, or (3) take such other action as it may deem appropriate. If an agreement is accepted, the Commission will place it on the public record, together with any initial report of compliance submitted pursuant to § 2.33, and at the same time, will make available an explanation of the provisions of the order and the relief to be obtained thereby and any other information which it deems helpful in assisting interested persons to understand the terms of the order. The Commission will publish the agreement, order and explanation in the FEDERAL REGISTER. For a period of sixty (60) days after placement of the order on the public record and issuance of the statement, the Commission will receive and consider any comments or views concerning the order that may be filed by any interested person. Thereafter, the Commission may either withdraw its acceptance of the agreement and so notify the parties, in which event it will return the matter to adjudication for further proceedings or take such other action as it may consider appropriate, or issue and serve its decision in disposition of the proceeding.

(g) This rule will not preclude the settlement of the case by regular adjudicatory process through the filing of an admission answer or submission of the case to the Administrative Law Judge on a stipulation of facts and an agreed order.

[40 FR 15236, Apr. 4, 1975, as amended at 42 FR 39659, Aug. 5, 1977; 43 FR 51758, Nov. 7, 1978; 50 FR 53305, Dec. 31, 1985]

Subpart D—Discovery; Compulsory Process

§ 3.31 General provisions.

(a) *Discovery methods.* Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or things for inspection and other purposes; and requests for admission. Unless the Administrative Law Judge orders otherwise, the frequency or sequence of these methods is not limited.

(b) *Scope of discovery.* Unless otherwise limited by order of the Administrative Law Judge or the Commission in accordance with these rules, the scope of discovery is as follows:

(1) *In general.* The Administrative Law Judge may authorize discovery upon a satisfactory showing that the requested discovery may reasonably be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. Such information may include the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having any knowledge of any discoverable matter. It shall not be an adequate ground for denying such authorization that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Privilege.* Authorization for discovery may be denied or limited, or a protective order may be entered, to preserve the privilege of a witness, person, or governmental agency as governed by the Constitution, any applicable act of Congress, or the principles of the common law as they may be interpreted by the Commission in the light of reason and experience.

(3) *Hearing preparation: Materials.* Subject to the provisions of paragraph (b)(4) of this section, a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (b)(1) of this section and prepared in anticipation of litigation or for hearing by or for another party or by or for that other party's representative (including the party's attorney, consultant, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Administrative Law Judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(4) *Hearing preparation: Experts.* (i) Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (b)(1) of this section and acquired or developed in anticipation of

litigation or for hearing, may be obtained only as follows:

(A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at hearing, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(B) Upon motion, the Administrative Law Judge may order further discovery by other means, subject to such restrictions as to scope as the Administrative Law Judge may deem appropriate.

(ii) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for hearing and who is not expected to be called as a witness at hearing, only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(iii) The Administrative Law Judge may require as a condition of discovery that the party seeking discovery pay the expert a reasonable fee, but not more than the maximum specified in 5 U.S.C. 3109 unless the parties have stipulated to a higher amount, for time spent in responding to discovery under paragraphs (b)(4)(i)(B) and (b)(4)(ii) of this section.

(c) *Protective orders.* (1) The Administrative Law Judge may deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding.

(2) [Reserved]

(d) *Stipulations.* When approved by the Administrative Law Judge, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.

(e) *Rulings on applications for compulsory process.* Applications for authorization to take depositions pursuant to the provisions of § 3.33, applications for the issuance of subpoenas pursuant to the provisions of § 3.34 or of offers pursuant to the provisions of § 3.37 (other than as provided in § 3.36), and applications for authorization to serve interrogatories pursuant to the provisions of § 3.35 may be made *ex parte*, and, if so made, such applications and rulings thereon shall remain *ex parte* unless otherwise ordered by the Administrative Law Judge or the Commission. Such applications, and motions for protective orders shall be ruled upon by the Administrative Law Judge or, in the event the Administrative Law Judge is not available, by the Chief Administrative Law Judge or such other Administrative Law Judge as the Chief Administrative Law Judge may designate.

[43 FR 56864, Dec. 4, 1978, as amended at 50 FR 53305, Dec. 31, 1985]

§ 3.32 Admissions.

(a) At any time after thirty (30) days after issuance of compliant, or after publication of notice of an adjudicative hearing in a rulemaking proceeding under § 3.13, any party may serve on any other party a written request for admission of the truth of any matters relevant to the pending proceeding set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or are known to be, and in the request are stated as being, in the possession of the other party. Each matter of which an admission is requested shall be separately set forth. A copy of the request shall be filed with the Secretary.

(b) The matter is admitted unless, within ten (10) days after service of the request, or within such shorter or longer time as the Administrative Law Judge may allow, the party to whom the request is directed serves upon the party requesting the admission, with a copy filed with the Secretary, a sworn written answer or objection addressed to the matter. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify its answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that it has made reasonable inquiry and that the information known to or readily obtainable by the party is insufficient to enable it to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may deny the matter or set fourth reasons why the party cannot admit or deny it.

(c) Any matter admitted under this rule is conclusively established unless the Administrative Law Judge on motion permits withdrawal or amendment of the admission. The Administrative Law Judge may permit withdrawal or amendment when the presentation of the merits of the proceeding will be subserved thereby and the party who obtained the admission fails to satisfy the Administrative Law Judge that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending proceeding only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

[43 FR 56865, Dec. 4, 1978, as amended at 50 FR 53305, Dec. 31, 1985]

§ 3.33 Depositions.

(a) *In general.* Any party may request the Administrative Law Judge to order the taking of a deposition or depositions of a named person or of a person or persons described with reasonable particularity. Such an order may be issued upon a satisfactory showing that the deposition or depositions may reasonably be expected to yield any information within the scope of discovery under § 3.31(b)(1). Such an order may also be issued to preserve relevant evidence upon a showing that there is substantial reason to believe that such evidence would not otherwise be available for presentation at the hearing. Depositions may be taken before any person having power to administer oaths, either under the law of the United States or of the state or other place in which the deposition is taken, who may be designated by the party seeking the deposition, provided that such person shall have no interest in the outcome of the proceeding. If such an order is issued, the party seeking the deposition shall serve upon each person whose deposition is sought and upon each party to the proceeding reasonable notice in writing of the time and place at which it will be taken, and the name and address of each person or persons to be examined, if known, and if the name is not known, a description sufficient to identify them.

(b) *Form of application.* Any party desiring to take a deposition or depositions shall make application in writing to the Administrative Law Judge making the showing required by paragraph (a) of this section and including, as appropriate, any applications or motions for subpoenas or other orders under § 3.34 or § 3.36.

(c) *Notice to corporation or other organization.* A party may in a request for authorization of a deposition and in a subpoena *ad testificandum* name as the deponent a public or private corporation, partnership, association, governmental agency other than the Federal Trade Commission, or any bureau or regional office of the Federal Trade Commission, and describe with reasonable particularity the matters on which examination is requested. If such deposition is ordered and subpoena issued, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

(d) *Taking of deposition.* Each deponent shall be duly sworn, and any party shall have the right to question him. Objections to questions or to evidence presented shall be in short form, stating the grounds of objections relied upon. The questions propounded and the answers thereto, together with all objections made, shall be recorded and certified by the officer. Thereafter, upon payment of the charges therefor, the officer shall furnish a copy of the deposition to the deponent and to any party.

(e) *Depositions upon written questions.* A party desiring to take a deposition upon written questions shall, upon order of the Administrative Law Judge, serve them upon every other party with a notice stating:

(1) The name and address of the person who is to answer them, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation, partnership, association, governmental agency other than the Federal Trade Commission, or any bureau or regional office of the Federal Trade Commission in accordance with the provisions of Rule 3.33(c). Within 30 days after the notice and written questions are served, any other party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, the party taking the deposition may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, any other party may serve recross questions upon all other parties. The content of any question shall not be disclosed to the deponent prior to the taking of the deposition. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly to take the testimony of the deponent in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

(f) *Correction of deposition.* A deposition may be corrected, as to form or substance, in the manner provided by § 3.44(b). Any such deposition shall, in addition to the other required procedures, be read to or by the deponent and signed by him, unless the parties by stipulation waive the signing or the deponent is unavailable or cannot be found or refuses to sign. If the deposition is not signed by the deponent within 30 days of its submission or attempted submission, the officer shall sign it and certify that the signing has been waived or that the deponent is unavailable or that the deponent has refused to sign, as the case may be, together with the reason for the refusal to sign, if any has been given. The deposition may then be used as though signed unless, on a motion to suppress under Rule 3.33(g)(3)(iv), the Administrative Law Judge determines that the reasons given for the refusal to sign require rejection of the deposition in whole or in part. In addition to and not in lieu of the procedure for formal correction of the deposition, the deponent may enter in the record at the time of signing a list of objections to the transcription of his remarks, stating with specificity the alleged errors in the transcript.

(g)(1) *Use of depositions in hearings.* At the hearing on the complaint or upon a motion, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(i) Any deposition may be used for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(ii) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated to testify on behalf of a public or private corporation, partnership or association which is a party, or of an official or employee (other than a special employee) of the Commission, may be used by an adverse party for any purpose.

(iii) A deposition may be used by any party for any purpose if the Administrative Law Judge finds:

(A) That the deponent is dead; or (B) that the deponent is out of the United States or is located at such a distance that his attendance would be impractical, unless it appears that the absence of the deponent was procured by the party offering the deposition; or (C) that the deponent is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the deponent by subpoena; or (E) that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

(iv) If only part of a deposition is offered in evidence by a party, any other party may introduce any other part which ought in fairness to be considered with the part introduced.

(2) *Objections to admissibility.* Subject to the provisions of paragraph (g)(3) of this section, objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(3) *Effect of errors and irregularities in depositions*—(i) *As to notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(ii) *As to disqualification of officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(iii) *As to taking of deposition.* (A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions are waived unless served in writing upon all parties within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(iv) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, endorsed, or otherwise dealt with by the officer are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or with due diligence might have been ascertained.

[43 FR 56865, Dec. 4, 1978]

§ 3.34 Subpoenas.

(a) *Subpoenas ad testificandum.* Application for issuance of a subpoena requiring a person to appear and depose or testify at the taking of a deposition or at an adjudicative hearing shall be made in writing to the Administrative Law Judge. If for the purpose of discovery, such subpoena may be issued upon a satisfactory showing that the testimony may reasonably be expected to yield any information within the scope of discovery under § 3.31(b)(1). If to preserve relevant evidence, such subpoena may be issued upon a showing that there is substantial reason to believe that such evidence would not otherwise be available for presentation at the hearing. If for testimony at an adjudicative hearing, such subpoena may be issued upon a showing of the reasonable relevancy of the expected testimony.

(b) *Subpoenas duces tecum.* Application for issuance of a subpoena requiring a person to appear and depose or testify and to produce specified documents (including writings, drawings, graphs, charts, photographs, phono records and other recordings, and other data compilations from which information can be obtained (translated, if necessary, by the person into reasonably usable form)) at the taking of a deposition, or at a prehearing conference, or at an adjudicative hearing shall be made in writing to the Administrative Law Judge, shall specify with reasonable particularity the material to be produced, showing that the material sought is reasonable in scope and, if for the purpose of discovery, falls within the limits of permissible discovery under § 3.31(b)(1), or, if for an adjudicative hearing, is reasonably relevant. Subpoenas *duces tecum* may be used by any party for purposes of discovery or for obtaining documents for use in evidence, or for both purposes.

(c) *Motions to quash.* Any motion by the subject of a subpoena to limit or quash the subpoena shall be filed within the earlier of ten (10) days after service thereof or the time for compliance therewith. Such motions shall set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate arguments, affidavits and other supporting documentation, and shall include the statement required by Rule 3.22(f).

[43 FR 56866, Dec. 4, 1978, as amended at 50 FR 42672, Oct. 22, 1985]

§ 3.35 Interrogatories to parties.

(a) *Availability; Procedures for Use.* (1) Upon authorization by the Administrative Law Judge, any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation, partnership, association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. For this purpose, information shall not be deemed to be available insofar as it is in the possession of the Commissioners, the General Counsel, the office of Administrative Law Judges, or the Secretary in his capacity as custodian or recorder of any such information, or their respective staffs.

(2) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to on grounds not raised and ruled on in connection with the authorization, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a respondent may serve answers or objections within 45 days after service of the complaint upon that respondent. The Administrative Law Judge may allow a shorter or longer time.

(b) *Scope; use at hearing.* (1) Interrogatories may relate to any matters which can be inquired into under § 3.31(b)(1), and the answers may be used to the extent permitted by the rules of evidence.

(2) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the Administrative Law Judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(c) *Option to produce records.* Where the answer to an interrogatory may be derived or ascertained from the records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. The specification shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.

[43 FR 56867, Dec. 4, 1978]

§ 3.36 Applications for subpoenas for records of the Commission or other governmental agency and for appearance of commission or other government officials and employees.

(a) *Form.* An application for issuance of a subpoena for documents (as defined in § 3.34(b)), or for the issuance of an order requiring access to documents pursuant to § 3.37, in the possession, custody, or control of the Federal Trade Commission or its employees, or of another governmental agency or its employees; or for the issuance of a subpoena requiring the appearance of an official or employee of the Commission, including complaint counsel, or the appearance of an official or employee of another governmental agency, shall be made in the form of a written motion filed in accordance with the provisions of § 3.22(a). No application for records pursuant to § 4.11 of this chapter or the Freedom of Information Act may be filed with the Administrative Law Judge.

(b) *Content.* The motion shall make the same showing required to obtain a subpoena under § 3.34 or an order under § 3.37, together with a specific showing that the information or material sought cannot reasonably be obtained by other means.

[43 FR 56867, Dec. 4, 1978]

§ 3.37 Access for inspection and other purposes.

(a) *Availability; Procedures for use.* Upon application in writing by any party, the Administrative Law Judge may issue an order requiring a party (1) to permit the party making the request, or someone acting on the party's behalf, to inspect and copy any designated documents, as defined in § 3.34(b), or to inspect and copy, test, or sample any tangible things which are in the possession, custody or control of the party upon whom the order would be served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the order would be served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon. Each such application shall specify with reasonable particularity the documents or things to be inspected, or the property to be entered, showing that the material sought is reasonable in scope and falls within the limits of permissible discovery under § 3.31(b)(1). Each such application shall also specify a reasonable time, place, and manner of making the inspection and performing the related acts. A party shall make documents available as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the order that requires their production.

(b) *Motion to quash.* Any motion by the subject of an order to limit or quash the order shall be filed within the earlier of ten (10) days after service thereof or the time for compliance therewith. Such motion shall set forth all assertions of privilege or other factual and legal objections to the order, including all appropriate arguments, affidavits and other supporting documentation, and shall include the statement required by Rule 3.22(f).

[43 FR 56867, Dec. 4, 1978, as amended at 50 FR 42672, Oct. 22, 1985; 50 FR 53305, Dec. 31, 1985]

§ 3.38 Motion for order compelling answer; sanctions.

(a) A party who has requested admissions or who has served interrogatories may move to determine the sufficiency of the answers or objections thereto. Unless the objecting party sustains its burden of showing that the objection is justified, the Administrative Law Judge shall order that an answer be served. If the Administrative Law Judge determines that an answer does not comply with the requirements of these rules, he may order either that the matter is admitted or that an amended answer be served. The Administrative Law Judge may, in lieu of these orders, determine that final disposition may be made at a prehearing conference or at a designated time prior to trial.

(b) If a party or an officer or agent of a party fails to comply with a subpoena or with an order including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or an order of the Administrative Law Judge or the Commission issued as, or in accordance with, a ruling upon a motion concerning such an order or subpoena or upon an appeal from such a ruling, the Administrative Law Judge or the Commission, or both, for the purpose of permitting resolution of relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

(1) Infer that the admission, testimony, documents or other evidence would have been adverse to the party;

(2) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the party;

(3) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, or agent, or the documents or other evidence;

(4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(5) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the party, or both.

(c) Any such action may be taken by written or oral order issued in the course of the proceeding or by inclusion in an initial decision of the Administrative Law Judge or an order or opinion of the Commission. It shall be the duty of parties to seek and Administrative Law Judges to grant such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for withheld testimony, documents, or other evidence. If in the Administrative Law Judge's opinion such relief would not be sufficient, or in instances where a nonparty fails to comply with a subpoena or order, he shall certify to the Commission a request that court enforcement of the subpoena or order be sought.

[43 FR 56867, Dec. 4, 1978, as amended at 50 FR 53305, Dec. 31, 1985]

§ 3.38A Withholding requested material.

(a) Any person withholding material responsive to a subpoena issued pursuant to § 3.34, written interrogatories authorized pursuant to § 3.35, an access order issued pursuant to § 3.37, or any other request for production of material issued under this part, shall assert a claim of privilege or any similar claim not later than the date set for the production of material. Such person shall, if so directed in the subpoena or other request for production, submit, together with such claim, a schedule of the items withheld which states individually as to each such item the type, title, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged.

(b) A person withholding material for reasons described in § 3.38A(a) shall comply with the requirements of that subsection in lieu of filing a motion to limit or quash compulsory process.

(Sec. 5, 38 Stat. 719 as amended (15 U.S.C. 45))

[44 FR 54043, Sept. 18, 1979]

§ 3.39 Orders requiring witnesses to testify or provide other information and granting immunity.

(a) Where Commission complaint counsel desire the issuance of an order requiring a witness or deponent to testify or provide other information and granting immunity under Title 18, section 6002, United States Code, Directors and Assistant Directors of Bureaus and Regional Directors and Assistant Regional Directors of Commission Regional Offices having responsibility for presenting evidence in support of the complaint are authorized to determine:

(1) That the testimony or other information sought from a witness or deponent, or prospective witness or deponent, may be necessary to the public interest, and (2) that such individual has refused or is likely to refuse to testify or provide such information on the basis of his privilege against self-incrimination; and to request, through the Commission's liaison officer, approval by the Attorney General for the issuance of such an order. Upon receipt of approval by the Attorney General (or his designee), the Administrative Law Judge is authorized to issue an order requiring the witness or deponent to testify or provide other information and granting immunity when the witness or deponent has invoked his privilege against self-incrimination and it cannot be determined that such privilege was improperly invoked.

(b) Requests by counsel other than Commission complaint counsel for an order requiring a witness to testify or provide other information and granting immunity under Title 18, section 6002, United States Code, may be made to the Administrative Law Judge and may be made ex parte. When such requests are made, the Administrative Law Judge is authorized to determine:

(1) That the testimony or other information sought from a witness or deponent, or prospective witness or deponent, may be necessary to the public interest, and (2) that such individual has refused or is likely to refuse to testify or provide such information on the basis of his privilege against self-incrimination; and, upon making such determinations, to request, through the Commission's liaison officer, approval by the Attorney General for the issuance of an order requiring a witness to testify or provide other information and granting immunity; and, after the Attorney General (or his designee) has granted such approval, to issue such order when the witness or deponent has invoked his privilege against self-incrimination and it cannot be determined that such privilege was improperly invoked.

(18 U.S.C. 6002, 6004)

[37 FR 5017, Mar. 9, 1972, as amended at 50 FR 53306, Dec. 31, 1985]

§ 3.40 Admissibility of evidence in advertising substantiation cases.

(a) If a person, partnership, or corporation is required through compulsory process under section 6, 9 or 20 of the Act issued after October 26, 1977 to submit to the Commission substantiation in support of an express or an implied representation contained in an advertisement, such person, partnership or corporation shall not thereafter be allowed, in any adjudicative proceeding in which it is alleged that the person, partnership, or corporation lacked a reasonable basis for the representation, and for any purpose relating to the defense of such allegation, to introduce into the record, whether directly or indirectly through references contained in documents or oral testimony, any material of any type whatsoever that was required to be but was not timely submitted in response to said compulsory process. *Provided, however*, that a person, partnership, or corporation is not, within the meaning of this section, required through compulsory process to submit substantiation with respect to those portions of said compulsory process to which such person, partnership, or corporation has raised good faith legal objections in a timely motion pursuant to the Commission's Rules of Practice and Procedure, until the Commission denies such motion; or if the person, partnership, or corporation thereafter continues to refuse to comply, until such process has been judically enforced.

(b) The Administrative Law Judge shall, upon motion, at any stage exclude all material that was required to be but was not timely submitted in response to compulsory process described in paragraph (a) of this section, or any reference to such material, unless the person, partnership, or corporation demonstrates in a hearing, and the Administrative Law Judge finds, that by the exercise of due diligence the material could not have been timely submitted in response to the compulsory process, and that the Commission was notified of the existence of the material immediately upon its discovery. Said findings of the Administrative Law Judge shall be in writing and shall specify with particularity the evidence relied upon. The rules normally governing the admissibility of evidence in Commission proceedings shall in any event apply to any material coming within the above exception.

[42 FR 56500, Oct. 10, 1977; 42 FR 61450, Dec. 5, 1977, as amended at 45 FR 45578, July 7, 1980]

Subpart E—Hearings

§ 3.41 General rules.

(a) *Public hearings.* All hearings in adjudicative proceedings shall be public unless an *in camera* order is entered by the Administrative Law Judge pursuant to § 3.45(b) of this chapter or unless otherwise ordered by the Commission.

(b) *Expedition.* Hearings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place and shall continue, except for brief intervals of the sort normally involved in judicial proceedings, without suspension until concluded. Consistent with the requirements of expedition:

(1) The Administrative Law Judge may order hearings at more than one place and may grant a reasonable recess at the end of a case-in-chief for the purpose of discovery deferred during the pre-hearing procedure where the Administrative Law Judge determines that such recess will materially expedite the ultimate disposition of the proceeding.

(2) When actions involving a common question of law or fact are pending before the Administrative Law Judge, the Administrative Law Judge may order a joint hearing of any or all the matters in issue in the actions; the Administrative Law Judge may order all the actions consolidated; and the Administrative Law Judge may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(3) When separate hearings will be conducive to expedition and economy, the Administrative Law Judge may order a separate hearing of any claim, or of any separate issue, or of any number of claims or issues.

(c) *Rights of parties.* Every party, except intervenors, whose rights are determined under § 3.14, shall have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.

(d) *Adverse witnesses.* An adverse party, or an officer, agent, or employee thereof, and any witness who appears to be hostile, unwilling, or evasive, may be interrogated by leading questions and may also be contradicted and impeached by the party calling him.

(e) *Participation in adjudicative packaging and labeling hearings.* At adjudicative hearings under the Fair Packaging and Labeling Act, any party or any interested person designated as a party pursuant to § 3.13, or his representative, may be sworn as a witness and heard.

(f) Requests for an order requiring a witness to testify or provide other information and granting immunity under Title 18, section 6002, of the United States Code, shall be disposed of in accordance with § 3.39.

(18 U.S.C. 6002, 6004)

[32 FR 8449, June 13, 1967, as amended at 37 FR 5017, Mar. 9, 1972; 37 FR 5609, Mar. 17, 1972; 39 FR 34398, Sept. 25, 1974; 44 FR 62887, Nov. 1, 1979]

§ 3.42 Presiding officials.

(a) *Who presides.* Hearings in adjudicative proceedings shall be presided over by a duly qualified Administrative Law Judge or by the Commission or one or more members of the Commission sitting as Administrative Law Judges; and the term "Administrative Law Judge" as used in this part means and applies to the Commission or any of its members when so sitting.

(b) *How assigned.* The presiding Administrative Law Judge shall be designated by the Chief Administrative Law Judge or, when the Commission or one or more of its members preside, by the Commission, who shall notify the parties of the Administrative Law Judge designated.

(c) *Powers and duties.* Administrative Law Judges shall have the duty to conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order. They shall have all powers necessary to that end, including the following:

(1) To administer oaths and affirmations;

(2) To issue subpenas and orders requiring answers to questions;

(3) To take depositions or to cause depositions to be taken;

(4) To compel admissions, upon request of a party or on their own initiative;

(5) To rule upon offers of proof and receive evidence;

(6) To regulate the course of the hearings and the conduct of the parties and their counsel therein;

(7) To hold conferences for settlement, simplification of the issues, or any other proper purpose;

(8) To consider and rule upon, as justice may require, all procedural and other motions appropriate in an adjudicative proceeding, including motions to open defaults;

(9) To make and file initial decisions;

(10) To certify questions to the Commission for its determination; and

(11) To take any action authorized by the rules in this part or in conformance with the provisions of the Administrative Procedure Act as restated and incorporated in Title 5, U.S.C.

(d) *Suspension of attorneys by Administrative Law Judge.* The Administrative Law Judge shall have the authority, for good cause stated on the record, to suspend or bar from participation in a particular proceeding any attorney who shall refuse to comply with his directions, or who shall be guilty of disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of such proceeding. Any attorney so suspended or barred may appeal to the Commission in accordance with the provisions of § 3.23(a). The appeal shall not operate to suspend the hearing unless otherwise ordered by the Administrative Law Judge or the Commission; in the event the hearing is not suspended, the attorney may continue to participate therein pending disposition of the appeal.

(e) *Substitution of Administrative Law Judge.* In the event of the substitution of a new Administrative Law Judge for the one originally designated, any motion predicated upon such substitution shall be made within five (5) days thereafter.

(f) *Interference.* In the performance of their adjudicative functions, Administrative Law Judges shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for the Commission, and all direction by the Commission to Administrative Law Judges concerning any adjudicative proceedings shall appear in and be made a part of the record.

(g) *Disqualification of Administrative Law Judges.* (1) When an Administrative Law Judge deems himself disqualified to preside in a particular proceeding, he shall withdraw therefrom by notice on the record and shall notify the Director of Administrative Law Judges of such withdrawal.

(2) Whenever any party shall deem the Administrative Law Judge for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding, such party may file with the Secretary a motion addressed to the Administrative Law Judge to disqualify and remove him, such motion to be supported by affidavits setting forth the alleged grounds for disqualification. If the Administrative Law

Judge does not disqualify himself within ten (10) days, he shall certify the motion to the Commission, together with any statement he may wish to have considered by the Commission. The Commission shall promptly determine the validity of the grounds alleged, either directly or on the report of another Administrative Law Judge appointed to conduct a hearing for that purpose.

(3) Such motion shall be filed at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification.

(h) *Failure to comply with Administrative Law Judge's directions.* Any party who refuses or fails to comply with a lawfully issued order or direction of an Administrative Law Judge may be considered to be in contempt of the Commission. The circumstances of any such neglect, refusal, or failure, together with a recommendation for appropriate action, shall be promptly certified by the Administrative Law Judge to the Commission. The Commission may make such orders in regard thereto as the circumstances may warrant.

[32 FR 8449, June 13, 1967, as amended at 37 FR 5609, Mar. 17, 1972; 41 FR 8340, Feb. 26, 1976; 43 FR 56868, Dec. 4, 1978; 46 FR 45750, Sept. 15, 1981; 50 FR 53306, Dec. 31, 1985]

§ 3.43 Evidence.

(a) *Burden of proof.* Counsel representing the Commission, or any person who has filed objections sufficient to warrant the holding of an adjudicative hearing pursuant to § 3.13, shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.

(b) *Admissibility.* Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence shall be excluded. Immaterial or irrelevant parts of an admissible document shall be segregated and excluded so far as practicable.

(c) *Information obtained in investigations.* Any documents, papers, books, physical exhibits, or other materials or information obtained by the Commission under any of its powers may be disclosed by counsel representing the Commission when necessary in connection with adjudicative proceedings and may be offered in evidence by counsel representing the Commission in any such proceeding.

(d) *Official notice.* When any decision of an Administrative Law Judge or of the Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor.

(e) *Objections.* Objections to evidence shall timely and briefly state the grounds relied upon, but the transcript shall not include argument or debate thereon except as ordered by the Administrative Law Judge. Rulings on all objections shall appear in the record.

(f) *Exceptions.* Formal exception to an adverse ruling is not required.

(g) *Excluded evidence.* When an objection to a question propounded to a witness is sustained, the questioner may make a specific offer of what he expects to prove by the answer of the witness, or the Administrative Law Judge may, in his discretion, receive and report the evidence in full. Rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

[32 FR 8449, June 13, 1967; 32 FR 8711, June 17, 1967, as amended at 48 FR 44766, Sept. 30, 1983]

§ 3.44 Record.

(a) *Reporting and transcription.* Hearings shall be stenographically reported and transcribed by the official reporter of the Commission under the supervision of the Administrative Law Judge, and the original transcript shall be a part of the record and the sole official transcript. Copies of transcripts are available from the reporter at rates not to exceed the maximum rates fixed by contract between the Commission and the reporter.

(b) *Corrections.* Corrections of the official transcript may be made only when they involve errors affecting substance and then only in the manner herein provided. Corrections ordered by the Administrative Law Judge or agreed to in a written stipulation signed by all counsel and parties not represented by counsel, and approved by the Administrative Law Judge, shall be included in the record, and such stipulations, except to the extent they are capricious or without substance, shall be approved by the Administrative Law Judge. Corrections shall not be ordered by the Administrative Law Judge except upon notice and opportunity for the hearing of objections. Such corrections shall be made by the official reporter by furnishing substitute type pages, under the usual certificate of the reporter, for insertion in the official record. The original uncorrected pages shall be retained in the files of the Commission.

§ 3.45 In camera orders.

(a) *Definition.* Except as hereinafter provided, documents and testimony made subject to in camera orders are not made a part of the public record, but are kept confidential, and only respondents, their counsel, authorized Commission personnel, and court personnel concerned with judicial review shall have access thereto. The right of the Administrative Law Judge, the Commission, and reviewing courts to disclose in camera data to the extent necessary for the proper disposition of the proceeding is specifically reserved.

(b) *In camera treatment of documents and testimony.* Administrative Law Judges shall have authority, but only in those unusual and exceptional circumstances when good cause is found on the record (see Commission's interlocutory decision in H. P. Hood & Sons, Inc., Docket 7709, Mar. 14, 1961, 58 F.T.C. 1184), to order documents or oral testimony offered in evidence whether admitted or rejected, to be placed in camera. The order shall specify the date on which in camera treatment expires and shall include:

(1) A description of the documents and testimony;

(2) A full statement of the reasons for granting in camera treatment; and

(3) A full statement of the reasons for the date on which in camera treatment expires.

Any party desiring, for the preparation and presentation of the case, to disclose in camera documents or testimony to experts, consultants, prospective witnesses, or witnesses, shall make application to the Administrative Law Judge setting forth the justification therefor. The Administrative Law Judge, in granting such application for good cause found, shall enter an order protecting the rights of the affected parties and preventing unnecessary disclosure of information. In camera documents and the transcript of testimony subject to an in camera order shall be segregated from the public record and filed in a sealed envelope, bearing the title and docket number of the proceeding, the notation "In Camera Record under § 3.45," and the date on which in camera treatment expires.

(c) *Release of in camera information.* In camera documents and testimony shall constitute a part of the confidential records of the Commission and shall be subject to the provisions of § 4.11 of this chapter. However, the Commission, on its own motion without notice to any affected party, may make in camera documents and testimony available for inspection, copying, or use by any other governmental agency.

(d) *Briefing of in camera information.* In the submittal of proposed findings, briefs, or other papers, counsel for all parties shall make a good faith attempt to refrain from disclosing the specific details of in camera documents and testimony. This shall not preclude references in such proposed findings, briefs, or other papers to such documents or testimony including generalized statements based on their contents. To the extent that counsel consider it necessary to include specific details of in camera data in their presentations, such data shall be incorporated in separate proposed findings, briefs, or other papers marked "confidential," which shall be placed in camera and become a part of the in camera record.

§ 3.46 Proposed findings, conclusions, and order.

(a) *General.* At the close of the reception of evidence, or within a reasonable time thereafter fixed by the Administrative Law Judge, any party may file with the Secretary of the Commission for consideration of the Administrative Law Judge proposed findings of fact, conclusions of law, and rule or order, together with reasons therefor and briefs in support thereof. Such proposals shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

(b) *Exhibit Index.* The first statement of proposed findings of fact and conclusions of law filed by a party shall include an index listing for each exhibit offered by the party and received in evidence: (1) the exhibit number, followed by (2) the exhibit's title or a brief description if the exhibit is untitled; (3) the transcript page at which the Administrative Law Judge ruled on the exhibit's admissibility or a citation to any written order in which such ruling was made; (4) the transcript pages at which the exhibit is discussed; (5) an identification of any other exhibit which summarizes the contents of the listed exhibit, or of any other exhibit of which the listed exhibit is a summary; (6) a cross-reference, by exhibit number, to any other portions of that document admitted as a separate exhibit on motion by any other party; and (7) a statement whether the exhibit has been accorded *in camera* treatment.

(c) *Witness Index.* The first statement of proposed findings of fact and conclusions of law filed by a party shall also include an index to the witnesses called by that party, to include for each witness: (1) the name of the witness; (2) a brief identification of the witness; (3) the transcript pages at which any testimony of the witness appears; and (4) a statement identifying any portion of the witness' testimony that was received *in camera*.

(d) *Stipulated indices.* As an alternative to the filing of separate indices, the parties are encouraged to stipulate to joint exhibit and witness indices at the time the first statement of proposed findings of fact and conclusions of law is due to be filed.

(e) *Rulings.* The record shall show the Administrative Law Judge's ruling on each proposed finding and conclusion, except when the order disposing of the proceeding otherwise informs the parties of the action taken.

[48 FR 56945, Dec. 27, 1983]

Subpart F—Decision

§ 3.51 Initial decision.

(a) *When filed and when effective.* The Administrative Law Judge shall file an initial decision within ninety (90) days after completion of the reception of evidence, or within thirty (30) days after a default or the granting of a motion for summary decision or waiver by the parties of the filing of proposed findings of fact, conclusions of law and order, or within such further time as the Commission may by order allow upon written request from the Administrative Law Judge. The initial decision shall become the decision of the Commission thirty (30) days after service thereof upon the parties or thirty (30) days after the filing of a timely notice of appeal, whichever shall be later, unless a party filing such a notice shall have perfected an appeal by the timely filing of an appeal brief or the Commission shall have issued an order placing the case on its own docket for review or staying the effective date of the decision.

(b) *Exhaustion of administrative remedies.* An initial decision shall not be considered final agency action subject to judicial review under 5 U.S.C. 704. Any objection to a ruling by the Administrative Law Judge, or to a finding, conclusion or a provision of the order in the initial decision, which is not made a part of an appeal to the Commission shall be deemed to have been waived.

(c) *Content.* (1) The initial decision shall include a statement of findings (with specific page references to principal supporting items of evidence in the record) and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record (or those designated under paragraph (c)(2) of this section) and an appropriate rule or order.

(2) When more than one claim for relief is presented in an action, or when multiple parties are involved, the Administrative Law Judge may direct the entry of an initial decision as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of initial decision.

(3) An initial decision shall be based upon a consideration of the whole record relevant to the issues decided pursuant to paragraph (c)(1) of this section, and it shall be supported by reliable, probative and substantial evidence.

(d) *By whom made.* The initial decision shall be made and filed by the Administrative Law Judge who presided over the hearings, except when he shall have become unavailable to the Commission.

(e) *Reopening of proceeding by Administrative Law Judge, termination of jurisdiction.* (1) At any time prior to the filing of his initial decision, an Administrative Law Judge may reopen the proceeding for the reception of further evidence.

(2) Except for the correction of clerical errors or pursuant to an order of remand from the Commission, the jurisdiction of the Administrative Law Judge is terminated upon the filing of his initial decision with respect to those issues decided pursuant to paragraph (c)(1) of this section.

[32 FR 8449, June 13, 1967, as amended at 35 FR 10656, July 1, 1970; 44 FR 62887, Nov. 1, 1979; 48 FR 52576, Nov. 21, 1983; 48 FR 54810, Dec. 7, 1983]

§ 3.52 Appeal from initial decision.

(a) *Who may file; notice of intention.* Any party to a proceeding may appeal an initial decision to the Commission by filing a notice of appeal with the Secretary within 10 days after service of the initial decision. The notice shall specify the party or parties against whom the appeal is taken and shall designate the initial decision and order or part thereof appealed from. If a timely notice of appeal is filed by a party, any other party may thereafter file a notice of appeal within 5 days after service of the first notice, or within 10 days after service of the initial decision, whichever period expires last.

(b) *Appeal brief.* The appeal shall be in the form of a brief, filed within 30 days after service of the initial decision, and shall contain, in the order indicated, the following:

(1) A subject index of the matter in the brief, with page references, and a table of cases (alphabetically arranged), textbooks, statutes, and other material cited, with page references thereto;

(2) A concise statement of the case;

(3) A specification of the questions intended to be urged;

(4) The argument presenting clearly the points of fact and law relied upon in support of the position taken on each question, with specific page references to the record and the legal or other material relied upon; and

(5) A proposed form of order for the Commission's consideration instead of the order contained in the initial decision.

The brief shall not, without leave of the Commission, exceed 60 pages, if printed, or 90 pages, if typewritten, including any appendices but exclusive of pages containing the table of contents, tables of authorities and any addendum containing statutes, rules and regulations.

(c) *Answering brief.* Within 30 days after service of the appeal brief, the appellee may file an answering brief, which shall contain a subject index, with page references, and a table of cases (alphabetically arranged), textbooks, statutes, and other material cited, with page references thereto, as well as arguments in response to the appellant's appeal brief. However, if the appellee is also cross-appealing, its answering brief shall also contain its arguments as to any issues the party is raising on cross-appeal, including the points of fact and law relied upon in support of its position on each question, with specific page references to the record and legal or other material on which the party relies in support of its cross-appeal, and a proposed form of order for the Commission's consideration instead of the order contained in the initial decision. If the appellee does not cross-appeal, its answering brief shall not, without leave of the Commission, exceed 60 pages, if printed, or 90 pages, if typewritten. If the appellee cross-appeals, its brief in answer and on cross-appeal shall not, without leave of the Commission, exceed 105 pages, if printed, or 160 pages, if typewritten. The page limitations of this paragraph include any appendices but are exclusive of pages containing the table of contents, tables of authorities, and any addendum containing statutes, rules and regulations.

(d) *Reply brief.* Within 7 days after service of the appellee's answering brief, the appellant may file a reply brief, which shall be limited to rebuttal of matters in the answering brief and shall not, without leave of the Commission, exceed 60 pages, if printed, or 90 pages, if typewritten. However, if the appellee has cross-appealed, any appellant who is the subject of the cross-appeal may, within 30 days after service of such appellee's brief, file a reply brief, which shall be limited to rebuttal of matters in the appellee's brief and shall not, without leave of the Commission, exceed 75 pages, if printed, or 115 pages, if typewritten. If the appellee has cross-appealed, any party who is the subject of the cross-appeal, other than an appellant may, within 30 days after service of the appellee's brief, file a reply brief which shall be limited to rebuttal of matters raised by the appellee's cross-appeal with respect to the party and shall not, without leave of the Commission, exceed 60 pages if printed, or 90 pages, if typewritten. The appellee who has cross-appealed may, within 7 days after service of a reply to its cross-appeal, file an additional brief, which shall be limited to rebuttal of matters in the reply to its cross-appeal and shall not, without leave of the Commission, exceed 30 pages, if printed, or 45 pages, if typewritten. The page limitations of this paragraph include any appendices but are exclusive of pages containing the table of contents, tables of authorities, and any addendum containing statutes, rules, and regulations. No further briefs may be filed except by leave of the Commission.

(e) *Form of briefs.* Briefs may be produced by standard typographic printing or by any duplicating or copying process which produces a clear black image on white paper. All printed matter must appear in the least 11 point type on opaque, unglazed paper. Briefs produced by the standard typographic process shall be bound in volumes having pages 6⅛ by 9¼ inches and type matter 4⅛ by 7⅛ inches. Those produced by any other process shall be bound in volumes having pages not exceeding 8½ by 11 inches and type matter not exceeding 6½ by 9½ inches, with double spacing between each line of text. Footnotes and quoted material within the text may be single-spaced. Both printed and typewritten briefs shall contain no more than 10 characters (including spaces) per inch.

(f) *Signature.* (1) The original of each brief filed shall have a hand-signed signature by an attorney of record for the party, or in the case of parties not represented by counsel, by the party itself, or by a partner if a partnership, or by an officer of the party if it is a corporation or an unincorporated association.

(2) Signing a brief constitutes a representation by the signer that he or she has read it, that to the best of his or her knowledge, information, and belief, the statements made in it are true, and that it is not interposed for delay. If a brief is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the proceeding may go forward as though the brief has not been filed.

(g) *Designation of appellant and appellee in cases involving cross-appeals.* In a case involving an appeal by complaint counsel and one or more respondents, any respondent who has filed a timely notice of appeal and as to whom the Administrative Law Judge has issued an order to cease and desist shall be deemed an appellant for purposes of paragraphs (b), (c), and (d) of this rule. In a case in which the Administrative Law Judge has dismissed the complaint as to all respondents, complaint counsel shall be deemed the appellant for purposes of paragraphs (b), (c), and (d) of this rule.

(h) *Oral argument.* All oral arguments shall be public unless otherwise ordered by the Commission. Oral arguments will be held in all cases on appeal to the Commission, unless the Commission otherwise orders upon its own initiative or upon request of any party made at the time of filing his brief. Oral arguments before the Commission shall be reported stenographically, unless otherwise ordered, and a member of the Commission absent from an oral argument may participate in the consideration and decision of the appeal in any case in which the oral argument is stenographically reported. The purpose of oral argument is to emphasize and clarify the written argument appearing in the briefs and to answer questions. Reading at length from the briefs or other texts is not favored.

(i) *Corrections in transcript of oral argument.* The Commission will entertain only joint motions of the parties requesting corrections in the transcript of oral argument, except that the Commission will receive a unilateral motion which recites that the parties have made a good faith effort to stipulate to the desired corrections but have been unable to do so. If the parties agree in part and disagree in part, they should file a joint motion incorporating the extent of their agreement, and, if desired, separate motions requesting those corrections to which they have been unable to agree. The Secretary, pursuant to delegation of authority by the Commission, is authorized to prepare and issue in the name of the Commission a brief "Order Correcting Transcript" whenever a joint motion to correct transcript is received.

(j) *Briefs of amicus curiae.* A brief of an amicus curiae may be filed by leave of the Commission granted on motion with notice to the parties or at the request of the Commission, except that such leave shall not be required when the brief is presented by an agency or officer of the United States; or by a State, territory, commonwealth, or the District of Columbia, or by an agency or officer of any of them. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and state how a Commission decision in the matter would affect the applicant or persons it represents. The motion shall also state the reasons why a brief of an amicus curiae is desirable. Except as otherwise permitted by the Commission, an amicus curiae shall file its brief within the time allowed the parties whose position as to affirmance or reversal the amicus brief will support. The Commission shall grant leave for a later filing only for cause shown, in which event it shall specify within what period such brief must be filed. A motion for an amicus curiae to participate in oral argument will be granted only for extraordinary reasons.

[32 FR 8449, June 13, 1967, as amended at 33 FR 7033, May 10, 1968; 41 FR 54486, Dec. 14, 1976; 42 FR 13540, Mar. 11, 1977; 42 FR 39977, Aug. 8, 1977; 50 FR 28096, July 10, 1985]

§ 3.53 Review of initial decision in absence of appeal.

An order by the Commission placing a case on its own docket for review will set forth the scope of such review and the issues which will be considered and will make provision for the filing of briefs if deemed appropriate by the Commission.

§ 3.54 Decision on appeal or review.

(a) Upon appeal from or review of an initial decision, the Commission will consider such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition, will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision.

(b) In rendering its decision, the Commission will adopt, modify, or set aside the findings, conclusions, and rule or order contained in the initial decision, and will include in the decision a statement of the reasons or basis for its action and any concurring and dissenting opinions.

(c) In those cases where the Commission believes that it should have further information or additional views of the parties as to the form and content of the rule or order to be issued, the Commission, in its discretion, may withhold final action pending the receipt of such additional information or views.

(d) The order of the Commission disposing of adjudicative hearings under the Fair Packaging and Labeling Act will be published in the FEDERAL REGISTER and, if it contains a rule or regulation, will specify the effective date thereof, which will not be prior to the ninetieth (90th) day after its publication unless the Commission finds that emergency conditions exist necessitating an earlier effective date, in which event the Commission will specify in the order its findings as to such conditions.

§ 3.55 Reconsideration.

Within twenty (20) days after completion of service of a Commission decision, any party may file with the Commission a petition for reconsideration of such decision, setting forth the relief desired and the grounds in support thereof. Any petition filed under this subsection must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission. Any party desiring to oppose such a petition shall file an answer thereto within ten (10) days after service upon him of the petition. The filing of a petition for reconsideration shall not operate to stay the effective date of the decision or order or to toll the running of any statutory time period affecting such decision or order unless specifically so ordered by the Commission.

Subpart G—[Reserved]

Subpart H—Reopening of Proceedings

§ 3.71 Authority.

Except while pending in a U.S. court of appeals on a petition for review (after the transcript of the record has been filed) or in the U.S. Supreme Court, a proceeding may be reopened by the Commission at any time in accordance with § 3.72. Any person subject to a Commission decision containing a rule or order which has become effective, or an order to cease and desist which has become final may file a request to reopen the proceeding in accordance with § 2.51.

[44 FR 40637, July 12, 1979]

§ 3.72 Reopening.

(a) *Before statutory review.* At any time prior to the expiration of the time allowed for filing a petition for review or prior to the filing of the transcript of the record of a proceeding in a U.S. court of appeals pursuant to a petition for review, the Commission may upon its own initiative and without prior notice to the parties reopen the proceeding and enter a new decision modifying or setting aside the whole or any part of the findings as to the facts, conclusions, rule, order, or opinion issued by the Commission in such proceeding.

(b) *After decision has become final.* (1) Whenever the Commission is of the opinion that changed conditions of fact or law or the public interest may require that a Commission decision containing a rule or order which has become effective, or an order to cease and desist which has become final by reason of court affirmance or expiration of the statutory period for court review without a petition for review having been filed, or a Commission decision containing an order dismissing a proceeding, should be altered, modified, or set aside in whole or in part, the Commission will, except as provided in § 2.51, serve upon each person subject to such decision (in the case of proceedings instituted under § 3.13, such service may be by publication in the FEDERAL REGISTER) an order to show cause, stating the changes it proposes to make in the decision and the reasons they are deemed necessary. Within thirty (30) days after service of such order to show cause, any person served may file an answer thereto. Any person not responding to the order within the time allowed may be deemed to have consented to the proposed changes.

(2) Whenever an order to show cause is not opposed, or if opposed but the

pleadings do not raise issues of fact to be resolved, the Commission, in its discretion, may decide the matter on the order to show cause and answer thereto, if any, or it may serve upon the parties (in the case of proceedings instituted under § 3.13, such service may be by publication in FEDERAL REGISTER) a notice of hearing, setting forth the date when the cause will be heard. In such a case, the hearing will be limited to the filing of briefs and may include oral argument when deemed necessary by the Commission. When the pleadings raise substantial factual issues, the Commission will direct such hearings as it deems appropriate, including hearings for the receipt of evidence by it or by an Administrative Law Judge. Unless otherwise ordered and insofar as practicable, hearings before an Administrative Law Judge to receive evidence shall be conducted in accordance with Subparts B, C, D, and E of Part 3 of this chapter. Upon conclusion of hearings before an Administrative Law Judge, the record and the Administrative Law Judge's recommendations shall be certified to the Commission for final disposition of the matter.

[32 FR 8449, June 13, 1967, as amended at 44 FR 40637, July 12, 1979; 45 FR 21623, Apr. 2, 1980]

Subpart I—Recovery of Awards Under the Equal Access to Justice Act in Commission Proceedings

AUTHORITY: Sec. (a)(1), Pub. L. 96-481, 94 Stat. 2325 (5 U.S.C. 504(c)(1) and 5 U.S.C. 553(b)).

SOURCE: 46 FR 48910, Oct. 5, 1981, unless otherwise noted.

§ 3.81 General provisions.

(a) *Purpose of these rules.* The Equal Access to Justice Act, 5 U.S.C. 504 (called "the Act" in this subpart), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to adjudicative proceedings under Part 3 of this title. An eligible party may receive an award when it prevails in the adjudicative proceeding, unless the Commission's position in the proceeding was substantially justified or special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record as a whole that is made in the adversary proceeding for which fees and other expenses are sought. The rules in this subpart describe the parties eligible for awards, how to apply for awards, and the procedures and standards that the Commission will use to make them.

(b) *When the Act applies.* The Act applies to any adjudicative proceeding pending before the Commission at any time after October 1, 1981. This includes proceedings begun before October 1, 1981, if final Commission action has not been taken before that date.

(c) *Proceedings covered.* (1) The Act applies to all adjudicative proceedings under this Part 3 of the rules of practice as defined in Rule 3.2, except hearings relating to the promulgation, amendment, or repeal of rules under the Fair Packaging and Labeling Act.

(d) *Eligibility of applicants.* (1) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adjudicative proceeding in which it seeks an award. The term "party" is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart.

(2) The types of eligible applicants are as follows:

(i) An individual with a net worth of not more than $2 million;

(ii) The sole owner of an unincorporated business who has a net worth of not more than $7 million, including both personal and business interests, and not more than 500 employees;

(iii) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(iv) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and

(v) Any other partnership, corporation, association, unit of local government, or organization with a net worth of not more than $7 million and not more than 500 employees.

(3) For the purpose of eligibility, the new worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(4) An applicant who owns an unincorporated business will be considered as an "individual" rather than a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(5) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(6) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the Administrative Law Judge determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the Administrative Law Judge may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(7) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

(e) *Standards for awards.* (1) A prevailing applicant may receive an award for fees and expenses incurred in connection with an entire proceeding, or on a substantive portion of the proceeding that is sufficiently significant and discrete to merit treatment as a separate unit unless the position of the agency over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible prevailing applicant is on complaint counsel, which may avoid an award by showing that its position had a reasonable basis in law and fact.

(2) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

(f) *Allowable fees and expenses.* (1) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(2) No award for the fee of an attorney or agent under these rules may exceed $75.00 per hour. No award to compensate an expert witness may exceed the highest rate at which the Commission paid expert witnesses for similiar services at the time the fees were incurred. The appropriate rate may be obtained from the Office of the Executive Director. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(3) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the Administrative Law Judge shall consider the following:

(i) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(ii) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(iii) The time actually spent in the representation of the applicant;

(iv) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(v) Such other factors as may bear on the value of the services provided.

(4) The reasonable cost of any study, analysis, engineering report, test,

project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

(g) *Rulemaking on maximum rates for attorney fees.* If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), this agency may, upon its own initiative or on petition of any interested person or group, adopt regulations providing that attorney fees may be awarded at a rate higher than $75 per hour in some or all of the types of proceedings covered by this part. Rulemaking under this provision will be in accordance with Rules of Practice Part 1, Subpart C of this chapter.

EDITORIAL NOTE: Consult the Federal Register for a document extending the effectiveness of these regulations.

[46 FR 48910, Oct. 5, 1981, as amended at 50 FR 53306, Dec. 31, 1985]

§ 3.82 Information required from applicants.

(a) *Contents of application.* An application for an award of fees and expenses under the Act shall contain the following:

(1) Identity of the applicant and the proceeding for which the award is sought;

(2) A showing that the applicant has prevailed;

(3) Identification of the Commission position(s) that applicant alleges was (were) not substantially justified;

(4) A brief description of the type and purpose of the organization or business (unless the applicant is an individual);

(5) A statement of how the applicant meets the criteria of § 3.81(d);

(6) The amount of fees and expenses sought;

(7) Any other matters the applicant wishes the Commission to consider in determining whether and in what amount an award should be made;

(8) A written verification under oath or under penalty or perjury that the information provided is true and correct accompanied by the signature of the applicant or an authorized officer or attorney.

(b) *Net worth exhibit.* (1) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the application and any affiliates (as defined in § 3.81(d)(6)) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The Administrative Law Judge may require an applicant to file additional information to determine its eligibility for an award.

(2) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the Administrative Law Judge in a sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b) (1)-(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on complaint counsel but need not be served on any other party to the proceeding. If the Administrative Law Judge finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with Rule 4.11.

(c) *Documentation of fees and expenses.* The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The Administrative Law Judge may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

(d) *When an application may be filed.* (1) An application may be filed whenever the applicant has prevailed in the entire proceeding or on a substantive portion of the proceeding that is sufficiently significant and discrete to merit treatment as a separate unit, but in no case later than 30 days after the Commission's final disposition of the proceeding.

(2) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(3) For purposes of this rule, final disposition means the later of (i) the date on which the initial decision of the Administrative Law Judge becomes the decision of the Commission pursuant to § 3.51(a), (ii) issuance of an order disposing of any petitions for reconsideration of the Commission's final order in the proceeding; (iii) if no petition for reconsideration is filed, the last date on which such petition could have been filed pursuant to § 3.55; or (iv) issuance of a final order or any other final resolution of a proceeding, such as a consent agreement, settlement or voluntary dismissal, which is not subject to a petition for reconsideration.

§ 3.83 Procedures for considering applicants.

(a) *Filing and service of documents.* Any application for an award or other pleading or document related to an application shall be filed and served on all parties as specified in §§ 4.2 and 4.4(b), except as provided in § 3.82(b)(2) for confidential financial information.

(b) *Answer to application.* (1) Within 30 days after service of an application, complaint counsel may file an answer to the application. Unless complaint counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b)(2) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(2) If complaint counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the Administrative Law Judge upon request by complaint counsel and the applicant.

(3) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of complaint counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, complaint counsel shall include with the answer either supporting affidavits or a request for further proceedings under paragraph (f) of this section.

(c) *Reply.* Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under paragraph (f) of this section.

(d) *Comments by other parties.* Any party to a proceeding other than the applicant and complaint counsel may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the Administrative Law Judge determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

(e) *Settlement.* The applicant and complaint counsel may agree on a proposed settlement of the award before final action on the application. A proposed award settlement entered into in connection with a consent agreement covering the underlying proceeding will be considered in accordance with § 3.25. The Commission may request findings of fact or recommendations on the award settlement from the Administrative Law Judge. A proposed award settlement entered into after the underlying proceeding has been concluded will be considered and may be approved or disapproved by the Administrative Law Judge subject to Commission review under paragraph (h) of this section. If a prevailing party and complaint counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

(f) *Further proceedings.* (1) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or complaint counsel, or on his or her own initiative, the Administrative Law Judge may order further proceedings, such as an informal conference, oral argument, additional written submissions or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible.

(2) A request that the Administrative Law Judge order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

(g) *Decision.* The Administrative Law Judge shall issue an initial decision on the application within 30 days after completion of proceedings on the application. The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the agency's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

(h) *Agency review.* Either the applicant or complaint counsel may seek review of the initial decision on the fee application, or the Commission may decide to review the decision on its own initiative, in accordance with § 3.53. If neither the applicant nor complaint counsel seeks review and the Commission does not take review on its own initiative, the initial decision on the application shall become a final decision of the Commission 30 days after it is issued. Whether to review a decision is a matter within the discretion of the Commission. If review is taken, the Commission will issue a final decision on the application or remand the application to the Administrative Law Judge for further proceedings.

(i) *Judical review.* Judicial review of final Commission decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

(j) *Payment of award.* An applicant seeking payment of an award shall submit to the Secretary of the Commission a copy of the Commission's final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. The agency will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adjudicative proceeding has been sought by the applicant or any other party to the proceeding.

[46 FR 48910, Oct. 5, 1981, as amended at 50 FR 53306, Dec. 31, 1985]

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PART 4—MISCELLANEOUS RULES

Sec.

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Authority: Sec. 6, 38 Stat. 721; 15 U.S.C. 46, unless otherwise noted.

Source: 32 FR 8456, June 13, 1967, unless otherwise noted.

Editorial Note: Nomenclature changes affecting Part 4 appear at 37 FR 22611, Oct. 20, 1972.

§ 4.1 Appearances.

(a) *Qualifications.* (1) Members of the bar of a Federal court or of the highest court of any State or Territory of the United States are eligible to practice before the Commission.

(2) Any individual or member of a partnership involved in any proceeding or investigation may appear on behalf of himself or of such partnership upon adequate identification. A corporation or association may be represented by a bona fide officer thereof upon a showing of adequate authorization.

(3) At the request of counsel representing any party in an adjudicative proceeding, the Administrative Law Judge may permit an expert in the same discipline as an expert witness to conduct all or a portion of the cross-examination of such witness.

(b) *Restrictions as to former members and employees.* (1) Except as provided in this section or otherwise specifically authorized by the Commission, no former member or employee of the Commission shall appear as attorney or counsel or otherwise participate through any form of professional consultation or assistance:

(i) In any proceeding or investigation, formal or informal, (A) if such proceeding or investigation was itself pending in the Commission while the former member or employee served with the Commission; (B) if an investigation from which such proceeding or investigation directly resulted was pending during such service; or (C) if such former member or employee, during the course of his service with the Commission, gained personal knowledge of nonpublic documents or information containing specific criteria for the initiation of future investigations or cases pertaining to a practice involved in the proceeding or investigation, and if the participation by the former member or employee would occur within three (3) years of the termination of his service with the Commission; or

(ii) In an investigation of compliance with an order, submission of a request to reopen an order, or a proceeding with respect to reopening of an order, if the former member or employee participated personally and substantially in the adjudicative proceeding or investigation that resulted in such order.

(2) In cases to which paragraph (b)(1) of this section is applicable, a former member or employee of the Commission may request authorization to appear or participate in a proceeding or investigation by filing with the Secretary of the Commission a written application therefor, disclosing the following information, to the extent known:

(i) The nature and extent of the former member's or employee's participation in, knowledge of, and connection with the proceeding or investigation during his service with the Commission; (ii) in the case of applications filed pursuant to paragraphs (b)(1)(i)(B), (b)(1)(ii), or (b)(1)(iii) of this section, the nature and extent of the former member's or employee's participation in, knowledge of, and connection with the predecessor investigation, adjudication or investigation, or rulemaking proceeding, respectively, during his service with the Commission; (iii) whether documents or information concerning the proceeding or investigation came to his attention

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and, if so, the nature of such documents or information; (iv) whether he was employed in the same bureau, office, division, or other administrative unit in which the proceeding or investigation is or has been pending; (v) whether he worked directly or in close association with Commission personnel assigned to the proceeding or investigation; and (vi) whether during his service with the commission he was engaged in any matter concerning the individual, company, industry, or any member of the industry involved in the proceeding or investigation.

(3) The requested authorization will not be given in any case (i) where it appears that the former member or employee during his service with the Commission participated personally and substantially in the proceeding or investigation; (ii) where the application is filed within two (2) years after termination of the former member's or employee's service with the Commission and it appears that within a period of one (1) year prior to the termination of his service the former member or employee was officially responsible for the proceeding or investigation; or (iii) where documents or information of the kind delineated in § 4.10(a) pertaining to the proceeding or investigation for which authorization is sought came to the attention of the former member or employee or would be likely to have come to his attention in the course of his duties, unless the Commission finds that the nature of the documents or information is such that no present advantage could thereby be derived.

(4) Notwithstanding any other provision of this section, no former member of the Commission and no former senior employee in a position designated by the Office of Government Ethics pursuant to 18 U.S.C. 207(d) shall, for a period of one (1) year after termination of the former member's or employee's service in that position, appear as attorney or counsel or otherwise represent anyone (other than the United States) in any formal or informal appearance before the Commission in any proceeding or investigation or, with the intent to influence, make any oral or written communication on behalf of anyone in any proceeding or investigation which is before the Commission or in which the Commission has a direct and substantial interest.

(5) The General Counsel shall have the authority (i) to determine whether, under paragraph (b)(1) of this section, a request for authorization to appear or participate need be filed and (ii) to grant any such request. In any case in which the General Counsel proposes that a request be denied, he shall refer the request to the Commission for determination, and in other unusual or difficult cases he may, in his sole discretion, refer a request to the Commission for determination.

(6)(i) The General Counsel shall (A) within three (3) working days of receipt of an oral or written request for a determination whether, under paragraph (b)(1) of this section, a request for authorization to appear or participate need be filed, render such determination and (B) within fifteen (15) working days of the receipt of a request for authorization to appear or participate, either grant such request or refer it to the Commission.

(ii) The Commission shall, within fifteen (15) working days of the receipt of a request referred by the General Counsel pursuant to paragraph (b)(5) of this section either grant or deny such request.

(iii)(A) The Commission or the General Counsel may, by written notice to the requester, and for good cause, extend the time limit for a determination by not more than fifteen (15) working days.

(B) Any time limit specified in this paragraph shall be tolled during such time as may elapse between a request by the Commission or General Counsel to the former member or employee for additional information and the receipt of such information by the Commission or General Counsel.

(7)(i) Paragraphs (b)(1), (b)(2), (b)(3) and (b)(4) of this section shall not apply to (A) pro se filings of any kind; (B) submissions of requests or appeals under the Freedom of Information Act, Privacy Act, or Government in the Sunshine Act; (C) testimony under oath; (D) submissions of statements required to be made under penalty of perjury; (E) submissions of statements based on the former member's or employee's own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received, other than that regularly provided by law or by § 4.5 for witnesses; and (F) appearances on behalf of the United States.

(ii) Paragraphs (b)(1), (b)(2), and (b)(3) shall not apply to (A) submissions of comments on a matter on which the Commission has invited public comment; and (B) filings of premerger notification forms or participation in subsequent events concerning compliance or noncompliance with Section 7A of the Clayton Act, 15 U.S.C. 18a, or any regulations issued pursuant to that section.

(8)(i) In any case in which a former member or employee of the Commission is prohibited under paragraph (b)(3)(i) of this section from appearing or participating in a Commission proceeding or investigation, no partner or legal or business associate of such former member or employee shall appear or participate in such proceeding or investigation, except as provided in this paragraph.

(ii) If a partner or legal or business associate of a former member or employee of the Commission prohibited under paragraph (b)(3)(i) of this section from appearing or participating in a Commission proceeding or investigation wishes to appear or participate in such proceeding or investigation, he shall file with the Secretary of the Commission, not later than the time such appearance or participation begins, an affidavit attesting:

(A) That the former member or employee will not participate in the proceeding or investigation in any way, directly or indirectly; (B) that he will not share, directly or indirectly, in any fees in the proceeding or investigation; (C) that all persons who intend to appear or participate are aware of the requirement that the former member or employee be screened from participating in or discussing the proceeding or investigation, or the firm's representation, and describing the procedures being taken to screen the personally disqualified former member or employee; (D) that the client or clients have been so informed; and (E) that the matter was not brought to such partner or legal or business associate through the active solicitation of the former member or employee.

(iii) Upon the filing of the affidavit, such partner or legal or business associate may begin such appearance or participation, *Provided, however,* That if the Commission finds (A) that the screening measures being taken are unsatisfactory or (B) that the matter was brought to such partner or legal or business associate through the active solicitation of the former member or employee, and so notifies such partner or legal or business associate, such appearance or representation shall cease immediately.

(9)(i) The restrictions and procedures in this subsection are intended to apply in lieu of restrictions and procedures as may be adopted by the appropriate authority in any state or jurisdiction, insofar as such restrictions and procedures apply to appearances or participation in Commission proceedings or investigations: *Provided, however,* That nothing in this section supersedes other standards of ethical conduct required under paragraph (e) of this section.

(ii) In the event that Commission approval is sought for an appearance or participation by a former member or employee in a proceeding in court or before another agency, the General Counsel shall have the authority to respond to such a request, applying as appropriate the standards of this paragraph (b)(9)(ii).

(c) *Public disclosure.* All applications requesting authorization to appear or participate in a proceeding or investigation, and the Commission's responses thereto, are part of the public records of the Commission, except for information exempt from disclosure under § 4.10(a) of this chapter.

(d) *Notice of appearance.* Any attorney desiring to appear before the Commission or an Administrative Law Judge on behalf of a person or party shall file with the Secretary of the Commission a written notice of his appearance, stating the basis of his eligibility under this section. No other application shall be required for admission to practice, and no register of attorneys will be maintained.

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(e) *Standards of conduct; disbarment.* (1) All attorneys practicing before the Commission shall conform to the standards of ethical conduct required of practitioners in the courts of the United States and by the bars of which the attorneys are members.

(2) If for good cause shown, the Commission shall be of the opinion that any attorney is not conforming to such standards, or that he has been otherwise guilty of conduct warranting disciplinary action, the Commission may issue an order requiring such attorney to show cause why he should not be suspended or disbarred from practice before the Commission. The alleged offender shall be granted due opportunity to be heard in his own defense and may be represented by counsel. Thereafter, if warranted by the facts, the Commission may issue against the attorney an order of reprimand, suspension, or disbarment.

[32 FR 8456, June 13, 1967, as amended at 40 FR 15235, Apr. 4, 1975; 41 FR 16453, Apr. 19, 1976; 46 FR 26295, May 12, 1981; 48 FR 44767, Sept. 30, 1983; 50 FR 50781, Dec. 12, 1985; 50 FR 53306, Dec. 31, 1985]

§ 4.2 Requirements as to form, and filing of documents other than correspondence.

(a) *Filing.* (1) Except as otherwise provided, all documents submitted to the Commission, including those addressed to the Administrative Law Judge, shall be filed with the Secretary of the Commission: *Provided, however,* That in any instance informal applications or requests may be submitted directly to the official in charge of any office of the Commission or to the appropriate Director, Deputy Director, Associate Director in the Bureau of Consumer Protection, or Assistant Director in the Bureau of Competition or to the Administrative Law Judge. Copies of all documents filed with the Secretary of the Commission by parties in adjudicative proceedings shall, at or before the time of filing, be served by the party filing the documents or person acting for that party on all other parties pursuant to § 4.4.

(2) Documents submitted to the Commission in response to a Civil Investigative Demand under section 20 of the FTC Act shall be filed with the custodian or deputy custodian named in the demand.

(b) *Title.* Documents shall clearly show the file or docket number and title of the action in connection with which they are filed.

(c) *Copies.* An original and twenty (20) copies of all documents before the Commission and motions for an Administrative Law Judge's certification of an interlocutory appeal pursuant to § 3.23(b) shall be filed; an original and ten (10) copies of all other documents before the Administrative Law Judge shall be filed; and an original and one (1) copy of compliance reports shall be filed. Only one (1) copy of admissions and answers thereto must be filed with the Secretary, the originals to be served on the opposing party as specified by § 3.32.

(d) *Form.* (1) Documents filed with the Secretary of the Commission, other than briefs in support of appeals from initial decisions, shall be printed, typewritten, or otherwise processed in permanent form and on good unglazed paper. A motion or other paper filed in an adjudicative proceeding shall contain a caption setting forth the title of the case, the docket number, and a brief descriptive title indicating the purpose of the paper.

(2) Briefs filed on an appeal from an initial decision shall be in the form prescribed by § 3.52(e).

(3) If printed, documents shall be on good unglazed paper seven (7) inches by ten (10) inches. The type shall not be less than ten (10) point adequately leaded. Citations and quotations shall not be less than ten (10) point single leaded, and footnotes shall not be less than eight (8) point single leaded. The printed line shall not exceed four and three-quarter (4¾) inches in length.

(4) If typewritten, documents shall be on paper not less than eight (8) inches nor more than eight and one-half (8½) inches by not less than ten and one-half (10½) inches nor more than eleven (11) inches.

(5) All documents must be bound on the left side. Except for printed documents, the left margin of each page must be at least one and one-half (1½) inches and the right margin at least one (1) inch.

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(e) *Signature.* (1) The original of each document filed shall have a hand signed signature by an attorney of record for the party, or in the case of parties not represented by counsel, by the party itself, or by a partner if a partnership, or by an officer of the party if it is a corporation or an unincorporated association.

(2) Signing a document constitutes a representation by the signer that he has read it, that to the best of his knowledge, information, and belief, the statements made in it are true, and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the proceeding may go forward as though the document had not been filed.

[32 FR 8456, June 13, 1967, as amended at 40 FR 59725, Dec. 30, 1975; 42 FR 30150, June 13, 1977; 45 FR 36344, May 29, 1980; 47 FR 7826, Feb. 23, 1982; 48 FR 41376, Sept. 15, 1983; 50 FR 28097, July 10, 1985]

§ 4.3 Time.

(a) *Computation.* Computation of any period of time prescribed or allowed by the rules in this chapter, by order of the Commission or an Administrative Law Judge, or by any applicable statute, shall begin with the first business day following that on which the act, event, or development initiating such period of time shall have occurred. When the last day of the period so computed is a Saturday, Sunday, or national holiday, or other day on which the office of the Commission is closed, the period shall run until the end of the next following business day. When such period of time, with the intervening Saturdays, Sundays, and national holidays counted, is seven (7) days or less, each of the Saturdays, Sundays, and such holidays shall be excluded from the computation. When such period of time, with the intervening Saturdays, Sundays, and national holidays counted, exceeds seven (7) days, each of the Saturdays, Sundays, and such holidays shall be included in the computation.

(b) *Extensions.* For good cause shown, the Administrative Law Judge may, in any proceeding before him, extend any time limit prescribed or allowed by the rules in this chapter or by order of the Commission or the Administrative Law Judge, except those governing the filing of interlocutory appeals and initial decisions and those expressly requiring Commission action. Except as otherwise provided by law, the Commission, for good cause shown, may extend any time limit prescribed by the rules in this chapter or by order of the Commission or an Administrative Law Judge: *Provided, however,* That in a proceeding pending before an Administrative Law Judge, any motion on which he may properly rule shall be made to him. Notwithstanding the above, where a motion to extend is made after the expiration of the specified period, the Administrative Law Judge or the Commission may consider the motion where the untimely filing was the result of excusable neglect.

(c) *Additional time after service by mail.* Whenever a party in an adjudicative proceeding under Part III of the rules is required or permitted to do an act within a prescribed period after service of a paper upon it and the paper is served by first-class mail pursuant to § 4.4(a)(3) or § 4.4(b), 3 days shall be added to the prescribed period.

[32 FR 8456, June 13, 1967, as amended at 42 FR 30150, June 13, 1977; 50 FR 28097, July 10, 1985; 50 FR 53306, Dec. 31, 1985]

§ 4.4 Service.

(a) *By the Commission.*

(1) Service of complaints, initial decisions, final orders and other processes of the Commission under 15 U.S.C. 45 may be effected as follows:

(i) *By registered or certified mail.* A copy of the document shall be addressed to the person, partnership, corporation or unincorporated association to be served at his, her or its residence or principal office or place of business, registered or certified, and mailed; service under this provision is complete upon delivery of the document by the Post Office; or

(ii) *By delivery to an individual.* A copy thereof may be delivered to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other execu-

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tive officer or a director of the corporation or unincorporated association to be served; service under this provision is complete upon delivery as specified herein; or

(iii) *By delivery to an address.* A copy thereof may be left at the principal office or place of business of the person, partnership, corporation, or unincorporated association, or it may be left at the residence of the person or of a member of the partnership or of an executive officer or director of the corporation, or unincorporated association to be served; service under this provision is complete upon delivery as specified herein.

(2) All other orders and notices, including subpoenas, orders requiring access, orders to file annual and special reports, and notices of default, may be served by any method reasonably certain to inform the affected person, partnership, corporation or unincorporated association, including any method specified in paragraph (a)(1), except that civil investigative demands may only be served in the manner provided by section 20(c)(7) of the FTC Act (in the case of service on a partnership, corporation, association, or other legal entity) or section 20(c)(8) of the FTC Act (in the case of a natural person). Service under this provision is complete upon delivery by the Post Office or upon personal delivery.

(3) All documents served in adjudicative proceedings under Part III of the Commission's Rules of Practice other than complaints and initial, interlocutory, and final decisions and orders may be served by personal delivery or by first-class mail and shall be deemed served on the day of personal delivery or the day of mailing.

(4) When a party has appeared in a proceeding by an attorney, service on that individual of any document pertaining to the proceeding other than a complaint shall be deemed service upon the party. However, service of those documents specified in paragraph (a)(1) of this section shall first be attempted in accordance with the provision of paragraphs (a)(1) (i), (ii), and (iii) of this section.

(b) *By other parties.* Service of documents by parties other than the Commission shall be by delivering copies thereof as follows: Upon the Commission, by personal delivery or delivery by first-class mail to the Office of the Secretary of the Commission and, in adjudicative proceedings under Part III of the Commission's Rules of Practice, to the Assistant Director in the Bureau of Competition, the Associate Director in the Bureau of Consumer Protection, or the Director of the Regional Office of complaint counsel. Upon a party other than the Commission or Commission counsel, service shall be by personal delivery or delivery by first-class mail. If the party is an individual or partnership, delivery shall be to such individual or a member of the partnership; if a corporation or unincorporated association, to an officer or agent authorized to accept service of process therefor. Personal service includes handling the document to be served to the individual, partner, officer, or agent; leaving it at his or her office with a person in charge thereof; or, if there is no one in charge or if the office is closed or if the party has no office, leaving it at his or her dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Documents served in adjudicative proceedings under Part III of the Commission's Rules of Practice shall be deemed served on the day of personal service or the day of mailing. All other documents shall be deemed served on the day of personal service or on the day of delivery by the Post Office.

(c) *Proof of service.* In an adjudicative proceeding under Part III of the Commission's Rules of Practice, papers presented for filing by a party respondent or intervenor shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the person served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed.

[50 FR 28097, July 10, 1985]

§ 4.5 Fees.

(a) *Deponents and witnesses.* Any person compelled to appear in person in response to subpoena shall be paid the same fees and mileage as are paid witnesses in the courts of the United States.

(b) *Presiding officers.* Officers before whom depositions are taken shall be entitled to the same fees as are paid for like services in the courts of the United States.

(c) *Responsibility.* The fees and mileage referred to in this section shall be paid by the party at whose instance deponents or witnesses appear.

§ 4.6 Cooperation with other agencies.

It is the policy of the Commission to cooperate with other governmental agencies to avoid unnecessary overlapping or duplication of regulatory functions.

§ 4.7 Ex parte communications.

(a) *Definitions.* For purposes of this section, "*ex parte* communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding.

(b) *Prohibited ex parte communications.* While a proceeding is in adjudicative status within the Commission, except to the extent required for the disposition of *ex parte* matters as authorized by law:

(1) No person not employed by the Commission, and no employee or agent of the Commission who performs investigative or prosecuting functions in adjudicative proceedings, shall make or knowingly cause to be made to any member of the Commission, or to the Administrative Law Judge, or to any other employee who is or who reasonably may be expected to be involved in the decisional process in the proceeding, an ex parte communciation relevant to the merits of that or a factually related proceeding; and (2) no member of the Commission, the Administrative Law Judge, or any other employee who is or who reasonably may be expected to be involved in the decisional process in the proceeding, shall make or knowingly cause to be made to any person not employed by the Commission, or to any employee or agent of the Commission who performs investigative or prosecuting functions in adjudicative proceedings, an *ex parte* communication relevant to the merits of that or a factually related proceeding.

(c) *Procedures.* A Commissioner, the Administrative Law Judge or any other employee who is or who may reasonably be expected to be involved in the decisional process who receives or who make or knowingly causes to be made, a communication prohibited by paragraph (b) of this section shall promptly provide to the Secretary of the Commission:

(1) All such written communications; (2) memoranda stating the substance of and circumstances of all such oral communications; and (3) all written responses, and memoranda stating the substance of all oral responses to the materials described in paragraphs (c) (1) and (2) of this section. The Secretary shall make relevant portions of any such materials part of the public record of the Commission, pursuant to § 4.8, and place them in the docket binder of the proceeding to which it pertains but they will not be considered by the Commission as part of the record for purposes of decision unless introduced into evidence in the proceeding. The Secretary shall also send copies of the materials to or otherwise notify all parties to the proceeding.

(d) *Sanctions.* (1) Upon receipt of an ex parte communication knowingly made or knowingly caused to be made by a party and prohibited by paragraph (b) of this section, the Commission, Administrative Law Judge, or other employee presiding over the proceeding may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the Commission, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation. The Commission may take such action as it considers appropriate, including but not limited to, action under § 4.1(e)(2) and 5 U.S.C. 556(d).

(2) A person, not a party to the proceeding who knowingly makes or causes to be made an ex parte communication prohibited by paragraph (b) of this section shall be subject to all sanctions provided herein if he subsequently becomes a party to the proceeding.

(e) The prohibitions of this section shall apply in an adjudicative proceeding from the time the Commission votes to issue a complaint pursuant to § 3.11, to conduct adjudicative hearings pursuant to § 3.13, or to issue an order to show cause pursuant to § 3.72(b), or from the time an order by a U.S. court of appeals remanding a Commission decision and order for further proceedings becomes effective, until the time the Commission votes to enter its decision in the proceeding and the time permitted by § 3.55 to seek reconsideration of that decision has elapsed. For purposes of this section, an order of remand by a U.S. court of appeals shall be deemed to become effective when the Commission determines not to file a petition for a writ of *certiorari*, or when the time for filing such a petition has expired without a petition having been filed, or when such a petition has been denied. If a petition for reconsideration of a Commission decision is filed pursuant to § 3.55, the provisions of this section shall apply until the time the Commission votes to enter an order disposing of the petition.

(f) The prohibitions of paragraph (b) of this section do not apply to a communication between a member of the Commission or an employee who is or who reasonable may be expected to be involved in the decisional process in the proceeding (other than the Administrative Law Judge and any employee assisting the Administrative Law Judge in the decisional process in the proceeding) and an employee or agent of the Commission who performs investigative or prosecuting functions in adjudicative proceedings, when such communication is occasioned by and concerns:

(1) The initiation, conduct, or disposition of a separate investigation or adjudicative proceeding, whether or not it involves a party already in an adjudicative proceeding; (2) a proceeding outside the scope of § 3.2, including a matter in state or federal court or before another governmental agency; (3) a nonadjudicative function of the Commission, including but not limited to an obligation under § 4.11 or a communication with Congress; or (4) the disposition of a consent settlement under § 3.25 executed by some but not all respondents: *Provided, however,* That to the extent such communication relates to a fact in issue in a proceeding in adjudicative status, such portion will be placed in the docket binder of the proceeding to which it pertains except for trade secrets or other confidential commercial or financial information. A brief statement describing the general subject matter of an *ex parte* communication of trade secrets or other commerical or financial information will be placed in the docket binder. The prohibitions of paragraph (b) of this section also do not apply to a communication between any member of the Commission, the Administrative Law Judge, or any other employee who is or who reasonably may be expected to be involved in the decisional process, and any employee who has been directed by the Commission or requested by an individual Commissioner or Administrative Law Judge, to assist in the decision of an adjudicative proceeding. Such employee shall not, however, have performed an investigative or prosecuting function in that or a factually related proceeding.

[42 FR 43974, Sept. 1, 1977, as amended at 44 FR 40637, July 12, 1979; 46 FR 32435, June 23, 1981; 50 FR 53306, Dec. 31, 1985]

§ 4.8 Availability of public information.

(a) All of the public records of the Commission are available for inspection at the principal office of the Commission on each business day from 9 a.m. to 5 p.m., and copies of some of those records are available at the regional offices and the field stations on each business day from 8:30 a.m. to 5 p.m.

(b) Reasonable facilities for copying and for producing copies are provided at each of the offices of the Commission. Subject to appropriate limitations and the availability of facilities, any person may copy without charge any of the public records available for inspection at each of those offices, or reproductions of any such records will be provided by the Commission to any person upon request in person or upon written request and the payment of the prescribed duplication fees. All written requests for reproductions of public records should be addressed to the Deputy Executive Director for Planning and Information, and should specify as clearly and accurately as reasonably possible the records desired. With respect to records which cannot be specified with complete clarity and particularity, identification requirements will be met by descriptions sufficient to enable qualified Commission personnel to locate the requested records. In any instance the Commission, the Deputy Executive Director for Planning and Information, or the official in charge of each office may restrict the use of the Commission's facilities to providing only one reproduction of any public record, or may refuse to permit the use of those facilities for copying and producing copies of records which are published or are publicly available at places other than the offices of the Commission, or may supply to any person only one reproduction of any record when copies thereof may be obtained from the Commission without charge.

(c)(1) User fees pursuant to 31 U.S.C. 483(a) and 5 U.S.C. 552(a), as amended by section (b)(1) of Pub. L. 93-502, shall be charged according to the schedule contained in paragraph (c)(2) of this section for services rendered in responding to requests for Commission records under this subpart unless the Deputy Executive Director for Planning and Information initially or the General Counsel or the Commission on appeal determines in conformity with the provisions of 5 U.S.C. 552(a), amended by Pub. L. 93-502, and 31 U.S.C. 483(a) that such charges or a portion thereof are not in the public interest. Such a determination will ordinarily not be made unless the service to be performed will benefit primarily the public as opposed to the requester, or unless the requester is a government agency or indigent. The first $10.00 of search and/or duplication fees are free to any requester. Ordinarily, fees will not be charged if the requested records are not found, or if all the records found are withheld as exempt. However, if the time expended in processing such a request is substantial, or if the requester has been notified of the estimated cost, pursuant to § 4.11 of the Rules, or has been advised that it cannot be determined in advance whether any records will be made available, fees may be charged. The Deputy Executive Director for Planning and Information, with the approval of the Commission, shall establish such fees.

(2) The following uniform schedule of fees applies to all constituent units of the Commission:

Reproduction

Paper copy	12 cents per page

Microfilm Services—Production of Microfilm

16 MM	6 cents per frame
Microfiche 4" x 6"	6 cents per frame

Duplication of Microfilm

16 MM	$4.30 per 100 ft. roll
16 MM Developing	$1.70 per 100 ft. roll
Microfiche 4" x 6"	15 cents each
3 M Cartridge	$1.28 each
Load Cartridge	50 cents each

Computer Services—Information Retrieval

Programmer	$8.75 per hour
Hard copy (paper) of each request	30 cents

Search Fees

Clerical	$5.50 per hour
Para-professional	$6.15 per hour
Professional	$13.25 per hour
Certification	$3.00 each

(3) Payment should be made by check or money order payable to the Treasury of the United States.

(5 U.S.C. 552; 15 U.S.C. 46(g))

[38 FR 1730, Jan. 18, 1973, as amended at 40 FR 7251, Feb. 19, 1975; 42 FR 56727, Oct. 28, 1977; 43 FR 57593, Dec. 8, 1978; 48 FR 4280, Jan. 31, 1983; 50 FR 53306, Dec. 31, 1985]

§ 4.9 Public records.

(a) *General.* (1) All records of the Commission are available for public inspection and copying either routinely or upon request except to the extent that they are exempt by law from mandatory public disclosure and are described in § 4.10 of this part.

(2) Records that are exempt from disclosure or are otherwise not available from the Commission's public record may be made available for inspection and copying only upon request under the procedures set forth in § 4.11 of this part, or as provided in §§ 4.10(d) through (g), 4.13, and 4.15(b)(3) of this part, by the Chairman under § 5.12(c) of this chapter, or by the Commission.

(b) *Categories of public records.* The public records of the Commission that are routinely available for inspection and copying include (except as provided in paragraph (c) of this section):

(1) *Commission Organization and Procedures (16 CFR Part 0 and §§ 4.14-4.15, 4.17).* (i) A current index of opinions, orders, statements of policy and interpretations, administrative staff manuals, general instructions and other public records of the Commission;

(ii) A current record of the final votes of each member of the Commission in all matters of public record, including matters of public record decided by notational voting;

(iii) Descriptions of the Commission's organization, including descriptions of where, from whom, and how the public may secure information, submit documents or requests, and obtain copies of orders, decisions and other materials;

(iv) Statements of the Commission's general procedures and policies and interpretations, its nonadjudicative procedures, its rules of practice for adjudicative proceedings, and its miscellaneous rules, including descriptions of the nature and requirements of all formal and informal procedures available, and

(v) Reprints of the principal laws under which the Commission exercises enforcement or administrative responsibilities.

(2) *Industry Guidance (16 CFR 1.1-1.6).* (i) Any advice, advisory opinion or response given and required to be made public under §§ 1.4 and 2.41 (d) or (f) of this chapter (whether by the Commission or the staff), together with a statement of supporting reasons;

(ii) Industry guides, digests of advisory opinions and compliance advice believed to be of interest to the public generally and other administrative interpretations;

(iii) Transcripts of hearings in all industry guide proceedings, as well as written statements filed with or forwarded to the Commission in connection with these proceedings; and

(iv) Petitions filed with the Secretary of the Commission for the promulgation or issuance, amendment, or repeal of industry guides.

(3) *Rulemaking (16 CFR 1.7-1.97).* (i) Petitions filed with the Secretary of the Commission for the promulgation or issuance, amendment, or repeal of rules or regulations within the scope of §§ 1.7 and 1.21 of this chapter, and petitions for exemptions;

(ii) Notices and advance notices of proposed rulemaking and rules and orders issued in rulemaking proceedings; and

(iii) Transcripts of hearings of all rulemaking proceedings, as well as written statements filed with or forwarded to the Commission in connection with these proceedings.

(4) *Investigations (16 CFR 2.7).* (i) Petitions to limit or quash compulsory process and the rulings thereon, requests for review by the full Commission of those rulings, and Commission rulings on such requests; and

(ii) Closing letters in initial phase and full phase investigations.

(5) *Adjudicative Proceedings and Litigated Orders (16 CFR 3.1-3.24, 3.31-3.55, 4.7).* (i) The pleadings and prehearing conferences (to the extent made available under § 3.21(d)), motions, certifications, orders, and the transcripts of hearings (including public conferences), testimony, oral arguments, and other material made a part thereof, and exhibits and all documents received in evidence or made a part of the record in adjudicative proceedings (except matters heard or filed *in camera*);

(ii) Initial decisions of administrative law judges;

(iii) Orders and opinions in interlocutory matters;

(iv) Final orders and opinions in adjudications, including separate statements of Commissioners;

(v) Petitions, applications, pleadings, briefs, and other records filed by the Commission with the courts in connection with adjudicative, injunctive, enforcement, compliance, and condemnation proceedings, and in connection with judicial review of Commission actions, and opinions and orders of the courts in disposition thereof;

(vi) Records of *ex parte* communications in adjudicative proceedings; and

(vii) Petitions to reopen proceedings and orders to determine whether orders should be altered, modified, or set aside in accordance with § 2.51.

(6) *Consent Agreements (16 CFR 2.31-2.34, 3.25, 3.71-3.72).* (i) Agreements containing orders, after acceptance by the Commission pursuant to §§ 2.34 and 3.25(f) of this chapter;

(ii) Comments filed under §§ 2.34 and 3.25(f) of this chapter concerning proposed consent agreements;

(iii) Final decisions and orders issued after the comment period prescribed in §§ 2.34 and 3.25(f), including separate statements of Commissioners; and

(iv) Petitions to reopen consent agreements to determine whether they should be altered, modified, or set aside in accordance with § 2.51.

(7) *Compliance/Enforcement (16 CFR 2.33, 2.41).* (i) Reports of compliance filed pursuant to the rules in this chapter or pursuant to a provision in a Commission order and supplemental materials filed in connection with these reports, except for reports of compliance, and supplemental materials filed in connection with Commission orders requiring divestitures or establishment of business enterprises or facilities, which are confidential until the last divestiture or establishment of a business enterprise or facility, as required by a particular order, has been finally approved by the Commission. At the time each such report is submitted the filing party may request confidential treatment in whole or in part and submit satisfactory reasons therefor, and the Commission with due regard for statutory restrictions, its rules and the public interest will pass upon such request;

(ii) Requests for advice concerning proposed mergers and material required to be made public under § 2.41(f) of the Commission Rules; and

(iii) Applications for approval of proposed divestitures, acquisitions or similar transactions subject to Commission review under outstanding orders together with supporting materials, objections and comments concerning these transactions submitted by the public and Commission responses.

(8) *Access to Documents and Meetings (16 CFR 4.8, 4.11, 4.13).* (i) Letters requesting access to Commission records pursuant to § 4.11(a) of this chapter and the Freedom of Information Act, 5 U.S.C. 552, and letters granting or denying such requests (not including access requests and answers thereto from the Congress or other government agencies);

(ii) Announcements of Commission meetings as required under the Sunshine Act, 5 U.S.C. 552b, including records of the votes to close such meetings;

(iii) Summaries or other explanatory materials relating to matters to be considered at open meetings made available pursuant to § 4.15(b)(3) of this chapter; and

(iv) Commission minutes of open meetings, and, to the extent they are not exempt from mandatory public disclosure under the Sunshine Act or the Freedom of Information Act, portions of minutes or transcripts of closed meetings.

(9) *Standards of Conduct (16 CFR 5.5-5.6, 5.10-5.26, 5.31, 5.57-5.68).*

(i) Memoranda to staff elaborating or clarifying standards described in administative staff manuals and Part 5 of this subchapter.

(10) *Miscellaneous (Press Releases, Clearance Requests, Reports Filed by or with the Commission, Continuing Guaranties, Registered Identification Numbers).* (i) Releases by the Commission's Office of Public Affairs supplying information concerning the activities of the Commission;

(ii) Applications under § 4.1(b)(2) of this chapter for clearance or authorization to appear or participate in a proceeding or investigation and of the Commission's responses thereto;

(iii) Continuing guaranties filed under the Wool, Fur, and Textile Acts;

(iv) Published reports by the staff or by the Commission on economic surveys and investigations of general interest;

(v) Filings by the Commission or by the staff in connection with proceedings before other federal agencies or state or local government bodies;

(vi) Registration statements and annual reports filed with the Commission by export trade associations, and bulletins, pamphlets, and reports with respect to such associations released by the Commission;

(vii) The identities of holders of registered identification numbers issued by the Commission pursuant to § 1.32 of this chapter;

(viii) The Commission's annual report submitted after the end of each fiscal year, summarizing its work during the year (available for inspection at each of the offices of the Commission with copies obtainable from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402) and any other annual reports made to Congress on activities of the Commission as required by law; and

(ix) Every amendment, revision, substitute, or repeal of any of the foregoing items listed in §§ 4.9(b)(1) through 4.9(b)(10) of this section.

(c) *Confidentiality.* (1) Persons submitting documentary material to the Commission described in this section may designate that material or portions of it confidential and request that it be withheld from the public record. No such material or portions of material (including documents generated by the Commission or its staff containing or reflecting such material or portions of material) will be placed on the public record pursuant to this section until the Commission has ruled on the request for confidential treatment and provided any prior notice to the submitter required by law. All requests for confidential treatment shall be supported by a showing of justification in light of applicable statutes, rules, orders of the Commission or its administrative law judges, orders of the courts, or other relevant authority.

(2) The Commission may withhold from the public record any documents or portions of documents otherwise falling within § 4.9(b) of this section to the extent they contain information that would be exempt from mandatory public disclosure under § 4.10 of this part.

[50 FR 50779, Dec. 12, 1985]

§ 4.10 Nonpublic information.

(a) The following records of the Commission are exempt from availability for public inspection and copying pursuant to 5 U.S.C. 552.

(1) Records, except to the extent required to be disclosed under other laws or regulations, related solely to the internal personnel rules and practices of the Commission. This exemption applies to internal rules or instructions to Commission personnel which must be kept confidential in order to assure effective performance of the functions and activities for which the Commission is responsible and which do not affect members of the public.

(2) Trade secrets and commercial or financial information obtained from a person and privileged or confidential. As provided in section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), this exemption applies to competitively sensitive information, such as costs or various types of sales statistics and inventories. It includes trade secrets in the nature of formulas, patterns, devices, and processes of manufacture, as well as names of customers in which there is a proprietary or highly competitive interest.

(3) Interagency or intra-agency memoranda or letters which would not routinely be available by law to a private party in litigation with the Commission. This exemption preserves the existing freedom of Commission officials and employees to engage in full and frank communication with each other and with officials and employees of other governmental agencies. This exemption includes records of the deliberations of the Commission except for the record of the final votes of each member of the Commission in every agency proceeding. It includes

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intraagency and interagency reports, memorandums, letters, correspondence, work papers, and minutes of meetings, as well as staff papers prepared for use within the Commission or between the Commission and other governmental agencies. It also includes information scheduled for public release, but as to which premature release would be contrary to the public interest.

(4) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy except to the extent such files or materials must be disclosed under other laws or regulations. This exemption applies to personnel and medical records and similar records containing private or personal information concerning any individual which, if disclosed to any person other than the individual concerned or his designated legal representative without his permission in writing, would constitute a clearly unwarranted invasion of personal privacy. Examples of files exempt from disclosure include, but are not limited to:

(i) The personnel records of the Commission; (ii) files containing reports, records or other material pertaining to individual cases in which disciplinary or other administrative action has been or may be taken, including records of proceedings pertaining to the conduct or performance of duties by Commission personnel;

(5) Investigatory records compiled for law enforcement purposes to the extent that release of information in such records would:

(i) Interfere with enforcement activities, (ii) deprive a person of a right to a fair trial or an impartial adjudication, (iii) constitute an unwarranted invasion of personal privacy, (iv) disclose the identity of a confidential source, (v) disclose investigative techniques or procedures, or (vi) endanger the life or physical safety of law enforcement personnel. This exemption covers, but is not limited to information obtained by the Commission relating to alleged or possible violations of laws administered by the Commission, which information may be in many forms, including letters of complaints, reports of interviews conducted by Commission personnel, memoranda, transcripts of testimony in nonpublic investigational hearings, and evidentiary documents obtained during the course of investigation.

(6) Information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(7) Geological and geophysical information and data, including maps, concerning wells; and

(8) Material (including transcripts of oral testimony) which is received by the Commission (i) in an investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission, and (ii) which is provided pursuant to any compulsory process under the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.*, or which is provided voluntarily in place of compulsory process in such an investigation. This material is exempt from disclosure under the Freedom of Information Act, by virtue of section 21(f) of the Federal Trade Commission Act.

(9) Material (including transcripts of oral testimony) which is received by the Commission pursuant to compulsory process in an investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission. This material is exempt from disclosure under the Freedom of Information Act by virtue of section 21(b)(3)(C) of the Federal Trade Commission Act.

(10) Such other records of the Commission as may from time to time be designated by the Commission as confidential pursuant to statute or Executive Order. This exempts from disclosure any information which has been designated nonpublic pursuant to criteria and procedures prescribed by Executive Order and which has not been subsequently declassified in accordance with applicable procedures. The exemption also preserves the full force and effect of statutes which restrict public access to specific government records.

(b) With respect to information contained in transcripts of Commission meetings, the exemptions contained in paragraph (a) of this section, except for paragraphs (a) (3) and (a) (7) of this section, shall apply; in addition, such information will not be made available if it is likely to have any of the effects described in 5 U.S.C. 552b (c) (5), (c) (9), or (c) (10).

(c) Under section 10 of the Federal Trade Commission Act, any officer or employee of the Commission who shall make public any information obtained by the Commission, without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and upon conviction thereof, may be punished by a fine not exceeding five thousand dollars ($5,000), or by imprisonment not exceeding 1 year, or by fine and imprisonment, in the discretion of the court.

(d) Except as provided in paragraphs (f) and (g) and in § 4.11 (b), (c), and (d), no material (including transcripts of oral testimony) which is marked or otherwise identified as confidential and which is within the scope of § 4.10(a)(8) and no material (including transcripts of oral testimony) which is within the scope of § 4.10(a)(9) which is not otherwise public shall be made available to any individual other than a duly authorized officer or employee of the Commission or a consultant or contractor retained by the Commission who has agreed in writing not to disclose the information without the consent of the person who produced the material. All other Commission records may be made available to a requester under the procedures set forth in § 4.11 or may be disclosed by the Commission except where prohibited by law.

(e) Except as provided in paragraphs (f) and (g) and in § 4.11 (b), (c), and (d), material (including transcripts of oral testimony) not within the scope of § 4.10(a)(8) or § 4.10(a)(9) which is received by the Commission and is marked or otherwise identified as confidential may be disclosed only if it is determined that the material is not within the scope of § 4.10(a)(2), and only if the submitter is provided at least 10 days' notice of the intent to disclose the material involved.

(f) Nonpublic material (including transcripts of oral testimony) obtained by the Commission may be disclosed to persons other than the submitter in connection with the taking of oral testimony without the consent of the submitter only if the material or transcript is not within the scope of § 4.10(a)(2). If the material is marked confidential, the submitter will be provided 10 days' notice of the intended disclosure or will be afforded an opportunity to seek an appropriate protective order.

(g) Material (including transcripts of oral testimony) obtained by the Commission may be disclosed in Commission administrative or court proceedings subject to appropriate Commission or court protective or *in camera* orders. See §§ 1.18(b) and 3.45 of this chapter. Prior to disclosing material or transcripts under this section the submitter will be afforded an opportunity to seek an appropriate protective or *in camera* order.

(15 U.S.C. 41 *et seq.*)

[38 FR 1731, Jan. 18, 1973, as amended at 40 FR 7629, Feb. 21, 1975; 40 FR 23278, May 29, 1975; 42 FR 13540, Mar. 11, 1977; 46 FR 26291, May 12, 1981; 46 FR 27634, May 21, 1981; 49 FR 30166, July 27, 1984]

§ 4.11 Requests for disclosure of records.

(a) *Freedom of Information Act requests*—(1) *Initial requests*—(i) *Form and contents; time of receipt.* (A) A request under the provisions of the Freedom of Information Act, 5 U.S.C. 552, as amended, for access to Commission records shall be in writing and addressed as follows:

Freedom of Information Act Request,
Office of the Deputy Executive Director for Planning and Information, Federal Trade Commission, 6th Street and Pennsylvania Avenue, NW., Washington, D.C. 20580.

(B) Failure to mark the envelope and the request in accordance with paragraph (a)(1)(i)(A) of this section will result in the request being treated as received on the date the request is actually received by the processing unit in the Office of the Deputy Executive Director for Planning and Information.

(C) Each request must specifically indicate the requester's willingness either (*1*) to pay, in accordance with § 4.8(c) of these rules, whatever fees may be charged for processing the request, or (*2*) a willingness to pay such fees up to a specified amount.

(D) If the indication required by paragraph (a)(1)(i)(C) of this section is absent, the requester will be advised by letter of the estimated fees and the request will be deemed not to have been received until the requester agrees to pay such fees; *provided, however,* if the Deputy Executive Director for Planning and Information determines that the estimated fees will not exceed $25.00, the request will be processed upon receipt in accordance with the requirements of paragraph (a)(1)(i) (A) or (B) of this section. For good cause an advance deposit may be required.

(E) The letter of request should indicate whether any waiver of fees is requested. The Deputy Executive Director for Planning and Information shall make a determination on any such request in accordance with § 4.8(c) and notify the requester accordingly. A denial may be appealed to the General Counsel. If a waiver is requested, and the requester has not provided the indication required by paragraph (a)(1)(i)(C) of this section, unless the Deputy Executive Director for Planning and Information determines that the estimated fees will not exceed $25.00, the access request will be deemed not to have been received until the waiver is granted.

(ii) *Identifiability.* (A) A request for access to Commission records must reasonably describe the records requested to enable Commission personnel to identify and locate them with a reasonable amount of effort. A request should be as specific as possible, and include, where known, information regarding dates, titles, file designations, location, and any other information which may assist the Commission in identifying and locating the records requested.

(B) A denial of a request may state that the description required by paragraph (a)(1)(ii)(A) of this section is insufficient to allow identification and location of the records.

(iii) *Time limit for initial determination.* (A) The Deputy Executive Director for Planning and Information shall, within ten (10) working days of the receipt of a request, either grant or deny, in whole or in part, such request.

(B) The Deputy Executive Director for Planning and Information may extend this time limit by not more than ten working days if such extension is:

(*1*) Necessary for locating records or transferring them from physically separate facilities; or

(*2*) Necessary to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are sought in a single or series of closely related requests; or

(*3*) Necessary for consultation with another agency having a substantial interest in the determination, or for consultation among two or more components of the Commission having substantial subject-matter interest therein.

(C) If the Deputy Executive Director for Planning and Information extends the time limit for initial determination pursuant to paragraph (a)(1)(iii)(B) of this section the requester shall be notified in accordance with 5 U.S.C. 552(a)(6)(B).

(D) If a request is not granted within the time limits set forth in paragraphs (a)(1)(iii) (A) and (B) of this section, the request shall be deemed to be denied and the requesting party may appeal such denial to the General Counsel in accordance with paragraph (a)(2) of this section.

(iv) *Initial determination.* (A) The Deputy Executive Director for Planning and Information shall grant access to requested records, or any portion thereof, that must be made available under the Freedom of Information Act. He shall deny access to records that are exempt under the Freedom of Information Act (5 U.S.C. 552(b)), unless he determines that such records fall within a category the Commission or the General Counsel has previously authorized to be made available to the public as a matter of policy. Denials shall set forth the reasons therefore and advise the requester that this determination can be appealed to the General Counsel either because the requester believes the records are not exempt, or because the requester believes the records are not exempt, or because the requester believes the General Counsel should exercise his discretion to release such records notwithstanding their exempt status.

(B) The Deputy Executive Director for Planning and Information is deemed to be the sole official responsible for all denials of initial requests, except denials to materials contained in active investigatory files in which case the Director of the Bureau or Regional Office responsible for the investigation shall be the responsible official.

(C) Records to which access has been granted will be made available to the requester and will remain available for inspection and copying for a period not to exceed thirty days from date of notification to the requester unless the requester asks for and receives the consent of the Deputy Executive Director for Planning and Information to a longer period. Records assembled pursuant to a request will remain available only during this time period and thereafter will be refiled. Appropriate fees may again be imposed for any new or renewed request for the same records.

(D) If a requested record cannot be located from the information supplied, or is known to have been destroyed or otherwise disposed of, the requester shall be so notified.

(2) *Appeals to the General Counsel from initial denials*—(i) *Form and contents; time of receipt.* (A) If the Deputy Executive Director for Planning and Information denies an initial request for records in its entirety, the requester may, within 30 days of the date of the determination of the Deputy Executive Director for Planning and Information, appeal such denial to the General Counsel. If the Deputy Executive Director for Planning and Information denies an initial request in part, the time for appeal shall not expire until 30 days after the date of the letter notifying the requester that all records to which access has been granted have been made available. The appeal shall be in writing and should include a copy of the initial request and a copy of the response of the Deputy Executive Director for Planning and Information, if any. The appeal shall be addressed as follows:

Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, 6th Street and Pennsylvania Avenue, NW., Washington DC 20580

(B) Failure to mark the envelope and the appeal, in accordance with paragraph (a)(2)(i)(A) of this section, will result in the appeal being treated as received on the date the appeal is actually received by the Office of the General Counsel.

(C) Each appeal to the General Counsel which requests him to exercise his discretion to release exempt records shall set forth the interest of the requester in the subject matter and the purpose for which the records will be used if the request is granted.

(ii) *Time limit for appeal.* (A) The General Counsel shall, within twenty (20) working days of the receipt of an appeal, either grant or deny the appeal, in whole or in part.

(B) The Commission or the General Counsel may, by written notice to the requester in accordance with 5 U.S.C. 552 (a)(6)(B), extend the time limit for deciding an appeal by not more than ten working days for the reasons set forth in paragraph (a)(1)(iii)(B), of this section, provided that the amount of any extensions utilized by the Deputy Executive Director for Planning and Information under that subsection shall be subtracted from the amount of additional time otherwise available.

(iii) *Determination of appeal.* (A) The General Counsel shall have the authority to grant or deny all appeals and to release as an exercise of discretion records exempt from mandatory disclosure under 5 U.S.C. 552(b). In unusual or difficult cases he may, in his sole discretion, refer an appeal to the Commission for determination. A denial of an appeal in whole or in part shall set forth the basis for the denial, and shall advise the requester that judicial review of the decision is available either in the district in which the requester resides or has a principal place of business, in the district in which the agency records are situated, or in the District of Columbia.

(B) The General Counsel shall be deemed solely responsible for all denials of appeals, except where an appeal is denied by the Commission. In such instances, the Commission shall be deemed solely responsible for the denial.

(b) *Requests from congressional committees and subcommittees.* Requests from congressional committees and subcommittees for nonpublic records shall be referred to the General Counsel for presentation to the Commission, subject to the provisions in 5 U.S.C. 552(c) and FTC Act 21(b) that neither the Freedom of Information Act, 5 U.S.C. 552, nor the Federal Trade Commission Act, 15 U.S.C. 41, et seq., is authority to withhold information from Congress. Upon receipt of a request from a congressional committee or subcommittee, notice will be given to the submitter of any material marked confidential, or any material within the scope of § 4.10(a)(9), that is responsive to the request that the request has been received. No other notice need be provided prior to granting the request. The Commission will inform the committee or subcommittee that the submitter considers such information confidential.

(c) *Requests from Federal and State law enforcement agencies.* Requests from law enforcement agencies of the Federal government should be addressed to the liaison officer for the requesting agency, or if there is none, to the General Counsel. Requests from state agencies should be addressed to the General Counsel. With respect to requests under this subsection, the General Counsel or the appropriate liaison officer is delegated the authority to dispose of them or may refer them to the Commission for determination, except that requests must be referred to the Commission for determination where the Bureau having the documents sought and the General Counsel do not agree on the disposition. Prior to granting access under this section to any material submitted to the Commission, the General Counsel or liaison officer will obtain from the requester a certification that such information will be maintained in confidence and will be used only for official law enforcement purposes. The certificate will also describe the nature of the law enforcement activity and the anticipated relevance of the information to that activity. A copy of the certificate will be forwarded to the submitter of the information at the time the request is granted unless the agency requests that the submitter not be notified.

(d) *Requests from Federal and State agencies for purposes other than law enforcement.* Requests from Federal and State agencies for access not related to law enforcement should be addressed to the General Counsel. Disclosure of nonpublic information will be made consistent with sections 6(f) and 21 of the FTC Act.

(e) *Information requested by subpoena in cases or matters to which the agency is not a party.*

(1) The procedures specified in this section will apply to all subpoenas directed to Commission employees, except special government employees, that relate in any way to the employees' official duties. These procedures will also apply to subpoenas directed to former Commission employees and current or former special government employees of the Commission, if the subpoenas seek nonpublic materials or information acquired during Commission employment. The provisions of paragraph (e)(3) of this section will also apply to subpoenas directed to the agency. For purposes of this section, the term "subpoena" includes any compulsory process in a case or matter to which the agency is not a party; the term "nonpublic" includes any material or information which, under § 4.10, is exempt from availability for public inspection and copying; the term "employees," except where otherwise specified, includes "special government employees" and other agency employees; and the term "special government employees" includes consultants and other employees as defined by section 202 of title 18 of the United States Code.

(2) Any employee or former employee who is served with a subpoena shall promptly advise the General Counsel of the service of the subpoena, the

nature of the documents or information sought, and all relevant facts and circumstances.

(3) A party causing a subpoena to be issued to the Commission or any employee or former employee of the Commission shall furnish a statement to the General Counsel. The statement shall set forth the party's interest in the case or matter, the relevance of the desired testimony or documents, and a discussion of whether the desired testimony or documents are reasonably available from other sources. If testimony is desired, the statement shall also contain a general summary of the testimony and a discussion of whether agency records could be produced and used in its place. Any authorization for testimony will be limited to the scope of the demand as summarized in such statement.

(4) Absent authorization from the General Counsel, the employee or former employee shall respectfully decline to produce requested documents or records or to disclose requested information. The refusal should be based on this paragraph and on *Touhy* v. *Ragen*, 340 U.S. 462 (1951).

(5) The General Counsel will consider and act upon subpoenas under this section with due regard for statutory restrictions, the Commission's rules and the public interest, taking into account factors such as the need to conserve the time of employees for conducting official business; the need to avoid spending the time and money of the United States for private purposes; the need to maintain impartiality between private litigants in cases where a substantial government interest is not involved; and the established legal standards for determining whether justification exists for the disclosure of confidential information and records.

(15 U.S.C. 41 et seq.)

[40 FR 7629, Feb. 21, 1975, as amended at 42 FR 13820, Mar. 14, 1977; 43 FR 5802, Feb. 10, 1978; 46 FR 26292, May 12, 1981; 48 FR 4280, Jan. 31, 1983; 49 FR 20279, May 14, 1984; 49 FR 21048, May 18, 1984; 50 FR 36048, Sept. 5, 1985; 50 FR 53306, Dec. 31, 1985]

§ 4.12 Disposition of documents submitted to the Commission.

(a) *Documents submitted to the Commission.* Any person who has submitted documentary material to the Commission (including transcripts of oral testimony) may obtain, on request, the return of material submitted to the Commission which has not been received into evidence (1) after the close of the proceeding in connection with which the documents were submitted or (2) when no proceeding in which the material may be used has been commenced within a reasonable time after completion of the examination and analysis of all such material and other information assembled in the course of the investigation. Such request shall be in writing, addressed to the custodian designated pursuant to § 2.16 or the Secretary of the Commission in all other circumstances, and shall reasonably describe the documents requested. A request for return of documents may be filed at any time, but documents will not be returned nor will commitments to return documents be undertaken prior to the time described in this subsection.

(b) *Commission-made copies of documents submitted to the Commission.* The Commission will not return to the submitter copies of documents made by the Commission unless, upon a showing of extraordinary circumstances, the Commission determines that return would be required in the public interest.

(c) *Disposition of documents not returned.* Subsequent to the time prescribed in paragraph (a) of this section, the staff will examine all submitted documents and Commission-made copies located in a reasonable search of the Commission's files and will determine, pursuant to the Federal Records Act, 44 U.S.C. 3301, which documents are appropriate for preservation as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Commission or because of the information value of data in them. The Commission will dispose of all documents determined not to be appropriate for preservation in accordance with applicable regulations of the General Services Administration.

[46 FR 26292, May 12, 1981]

§ 4.13 Privacy Act rules.

(a) *Purpose and scope.* (1) This section is promulgated to implement the Privacy Act of 1974 (Pub. L. 93-579, 5 U.S.C. 552a) by establishing procedures whereby an individual can, as to all systems of records maintained by the Commission except those set forth in § 4.13(m) as exempt from disclosure, (i) Request notification of whether the Commission maintains a record pertaining to him in any system of records, (ii) request access to such a record or to an accounting of its disclosure, (iii) request that the record be amended or corrected, and (iv) appeal an initial adverse determination of any such request. This section also establishes those systems of records that are specifically exempt from disclosure and from other requirements.

(2) The procedures of this section apply only to requests by an individual as defined in § 4.13(b). Except as otherwise provided, they govern only records containing personal information in systems of records for which notice has been published by the Commission in the FEDERAL REGISTER pursuant to section 552a(e)(4) of the Privacy Act of 1974 and which are neither exempt from the provisions of this section nor contained in government-wide systems of personnel records for which notice has been published in the FEDERAL REGISTER by the Office of Personnel Management. Requests for notification, access, and amendment of personnel records which are contained in a system of records for which notice has been given by the Office of Personnel Management are governed by the Office of Personnel Management's notices, 5 CFR Part 297. Access to records which are not subject to the requirements of the Privacy Act are governed by §§ 4.8 through 4.11.

(b) *Definitions.* The following definitions apply to this section only:

(1) "Individual" means a natural person who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) "Record" means any item, collection, or grouping of personal information about an individual that is maintained by the Commission, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph, but does not include information concerning proprietorships, businesses, or corporations.

(3) "System of records" means a group of any records under the control of the Commission from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual, for which notice has been published by the Commission in the FEDERAL REGISTER pursuant to 5 U.S.C. 552a(e)(4).

(c) *Procedures for requests pertaining to individual records in a record system.* An individual may request access to his records or any information pertaining to him in a system of records, and notification of whether and to whom the Commission has disclosed a record for which an accounting of disclosures is required to be kept and made available to him, using the procedures of this subsection. Requests for the disclosure of records under this subsection or to determine whether a system of records contains records pertaining to an individual or to obtain an accounting of disclosures, shall be in writing and if mailed, addressed as follows:

Privacy Act Request, Office of the Deputy Executive Director for Planning and Information, Federal Trade Commission, 6th Street and Pennsylvania Avenue NW., Washington, D.C. 20580.

If requests are presented in person at the Office of the Deputy Executive Director for Planning and Information, the individual shall be required to execute a written request. All requests must name the system of records which is the subject of the request, and must include any additional information specified in the pertinent system notice as necessary to locate the records requested. If the requester desires to permit a person to accompany him to review his record, the request shall so state. Nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(d) *Times, places, and requirements for identification of individuals making requests.* Verification of identity of persons making written requests to the Deputy Executive Director for Planning and Information ordinarily will not be required. The signature upon such requests shall be deemed to be a certification by the person signing that he is the individual to whom the record pertains or the parent of a minor or the duly appointed legal guardian of the individual to whom the record pertains. The Deputy Executive Director for Planning and Information may require additional verification of identity as specified by him when necessary reasonably to assure that records are not improperly disclosed: provided, however, that no verification of identity will be required where the records sought are publicly available under the Freedom of Information Act.

(e) *Disclosure of requested information to individuals.* Within ten (10) working days of receipt of a request under § 4.13(c), the Deputy Executive Director for Planning and Information shall acknowledge receipt of the request. Within thirty (30) working days of the receipt of a request under § 4.13(c), the Deputy Executive Director for Planning and Information shall inform the requester whether a system of records containing retrievable information pertaining to the requester exists, and if so, either that his request has been granted or that the requested records or information is exempt from disclosure pursuant to § 4.13(m). When, for good cause shown, the Deputy Executive Director for Planning and Information is unable to respond within thirty (30) working days of the receipt of the request, he shall notify the requester of that fact and approximately when it is anticipated that a response will be made.

(f) *Special procedures: Medical records.* When the Deputy Executive Director for Planning and Information determines that disclosure of a medical or psychological record directly to a requesting individual could have an adverse effect on the individual, he shall require the individual to designate a medical doctor to whom the record will be transmitted.

(g) *Request for correction or amendment of record.* An individual to whom access to his records or any information pertaining to him in a system of records has been granted may request that any portion thereof be amended or corrected because he believes it is not accurate, relevant, timely, or complete. An initial request for correction or amendment of a record shall be in writing whether presented in person or by mail, and if by mail, addressed as in § 4.13(c). In making a request under this subsection, the requesting party shall state the nature of the information in the record the individual believes to be inaccurate, irrelevant, untimely, or incomplete, the correction or amendment desired, and the reasons therefore.

(h) *Agency review of request for correction or amendment of record.* Whether presented in person or by mail, requests under § 4.13(g) shall be acknowledged by the Deputy Executive Director for Planning and Information within ten (10) working days of the receipt of the request if action on the request cannot be completed and the individual notified of the results within that time. Thereafter, the Deputy Executive Director for Planning and Information shall promptly either make the requested amendment or correction or inform the requester of his refusal to make the amendment or correction, the reasons for the refusal, and the requester's right to appeal that determination in accordance with § 4.13(i).

(i) *Appeal of initial adverse agency determination.* (1) If the Deputy Executive Director for Planning and Information denies an initial request under § 4.13(c) or § 4.13(g), the requester may appeal that determination to the Commission. The appeal shall be in writing and addressed as follows:

Privacy Act Appeal, Office of the General
Counsel, Federal Trade Commission, 6th

Street and Pennsylvania Avenue NW., Washington, D.C. 20580.

The Commission shall notify the requester within thirty (30) working days of the receipt of his appeal of the disposition of that appeal, except that the thirty (30) day period may be extended for good cause, in which case the requester will be advised of the approximate date on which review will be completed.

(2)(i) If the Commission refuses to amend or correct the record in accordance with a request under § 4.13(g), it shall notify the requester of that determination and inform him of his right to file with the Deputy Executive Director for Planning and Information of the Commission a concise statement setting forth the reasons for his disagreement with that determination and the fact that such a statement will be treated as set forth in paragraph (i)(2)(ii) of this section. The Commission shall also inform the requester that judicial review of the determination is available by a civil suit in the district in which the requester resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia.

(ii) If the individual files a statement disagreeing with the Commission's determination not to amend or correct a record, it shall be clearly noted in the record involved and made available to anyone to whom the record has been disclosed after September 27, 1975, or is subsequently disclosed together with, if the Commission deems it appropriate, a brief statement of the reasons for refusing to amend the record.

(j) *Disclosure of record to person other than the individual to whom it pertains.* Except as provided by 5 U.S.C. 552a(b), the written request or prior written consent of the individual to whom a record pertains, or of his parent if a minor, or legal guardian if incompetent, shall be required before such record is disclosed. If the individual elects to inspect a record in person and desires to be accompanied by another person, the Deputy Executive Director for Planning and Information may require the individual to furnish a signed statement authorizing his record to be disclosed in the presence of the accompanying named person.

(k) *Fees.* No fees shall be charged for searching for a record, reviewing it, or for copies of records made by the Commission for its own purposes incident to granting access to a requester. Copies of records to which access has been granted under this section may be obtained by the requester from the Deputy Executive Director for Planning and Information upon payment of the reproduction fees provided in § 4.8(c)(2).

(l) *Penalties.* Section 552a(i)(3) of the Privacy Act, 5 U.S.C. 552a(i)(3), makes it a misdemeanor, subject to a maximum fine of $5,000, to knowingly and willfully request or obtain any record concerning an individual under false pretenses. Sections 552a(i)(1) and (2) of the Privacy Act, 5 U.S.C. 552a(i) (1) and (2), provide penalties for violations by agency employees of the Privacy Act or regulations established thereunder. Title 18 U.S.C. 1001, Crimes and Criminal Procedures, makes it a criminal offense, subject to a maximum fine of $10,000 or imprisonment for not more than 5 years or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

(m) *Specific exemptions.* Pursuant to 5 U.S.C. 552a(k)(2), investigatory material compiled for law enforcement purposes in the following systems of records is exempt from subsections (c)(3), (d), (e)(1), (e)(4), (G), (H), and (I), and (f) of 5 U.S.C. 552a, and from the provisions of this section, except as otherwise provided in section 552a(k)(2):

Disciplinary Action Investigatory Files—FTC.

Investigational, Legal, and Public Records—FTC.

Litigation Information Management Systems for Investigations, Rulemaking, and Adjudicatory Proceedings—FTC.

Preliminary Investigation Files—FTC.

[40 FR 40780, Sept. 3, 1975, as amended at 46 FR 26292, May 12, 1981; 48 FR 4280, Jan. 31, 1983]

§ 4.14 Conduct of business.

(a) Matters before the Commission for consideration may be resolved either at a meeting under § 4.15 or by written circulation. Any Commissioner may direct that a matter presented for consideration be placed on the agenda of a Commission meeting.

(b) *Quorum.* A majority of the members of the Commission, constitutes a quorum for the transaction of business.

(c) Any Commission action, either at a meeting or by written circulation, may be taken only with the affirmative concurrence of a majority of the participating Commissioners, except where a greater majority is required by statute or rule or where the action is taken pursuant to a valid delegation of authority. No Commissioner may delegate the authority to determine his or her vote in any matter requiring Commission action, but authority to report a Commissioner's vote on a particular matter resolved either by written circulation, or at a meeting held in the Commissioner's absence, may be vested in a member of the Commissioner's staff.

[42 FR 13540, Mar. 11, 1977, as amended at 50 FR 53306, Dec. 31, 1985]

§ 4.15 Commission meetings.

(a) *In general.* (1) Meetings of the Commission, as defined in 5 U.S.C. 552b(a)(2), are held at the principal office of the Commission, unless otherwise directed.

(2) *Initial announcements of meetings.* For each meeting, the Commission shall announce: (i) The time, place and subject matter of the meeting, (ii) whether the meeting will be open or closed to the public, and (iii) the name and phone number of the official who will respond to requests for information about the meeting. Such announcement shall be made at least one week before the meeting except that where the agency determines pursuant to 5 U.S.C. 552b(e)(1) to call the meeting on less than one week's notice, or where the agency determines to close the meeting pursuant to paragraph (c)(2) of this section, the announcement shall be made at the earliest practicable time.

(3) *Announcements of changes in meetings.* Following the announcement of a meeting, any change in the time, place or subject matter will be announced at the earliest practicable time, and, except with respect to meetings closed under paragraph (c)(2) of this section, any change in the subject matter or decision to open or close a meeting shall be made only as provided in 5 U.S.C. 552b(e)(2).

(4) *Deletions from announcements.* The requirements of paragraphs (a)(2) and (a)(3) of this section do not require the disclosure of any information pertaining to a portion of a closed meeting where such disclosure is likely to concern a matter within the scope of 5 U.S.C. 552b(c).

(5) *Dissemination of notices.* Notices required under paragraphs (a)(2) and (a)(3) of this section will be posted at the principal office of the Commission, recorded on a telephone message device, and, except as to notices of meetings closed under paragraph (c)(2) of this section, submitted to the FEDERAL REGISTER for publication. In addition, notices issued under paragraph (a)(2) of this section one week in advance of the meeting will be sent to all persons and organizations who have requested inclusion on a meeting notice mailing list, and will be issued as a press release to interested media.

(b) *Open meetings.* (1) Commission meetings shall be open to public observation unless the Commission determines that portions may be closed pursuant to 5 U.S.C. 552b(c).

(2) Any person whose interest may be directly affected if a portion of a meeting is open, may request that the Commission close that portion for any of the reasons described in 5 U.S.C. 552b(c). The Commission shall vote on such requests if at least one member desires to do so. Such requests shall be in writing, filed at the earliest practicable time, and describe how the matters to be discussed will have any of the effects enumerated in 5 U.S.C. 552b(c). Requests shall be addressed as follows:

Closed Meeting Request, Office of the General Counsel, Federal Trade Commission, 6th Street and Pennsylvania Avenue NW., Washington, D.C. 20580.

(3) The Commissioner to whom a matter has been assigned for presentation to the Commission shall have the authority to make available to the public, prior to consideration of that matter at an open meeting, material sufficient to inform the public of the issues likely to be discussed in connection with that matter.

(c) *Closed meetings.* (1) Whenever the Commission votes to close a meeting or series of meetings under these rules, it shall make publicly available within one day notices both of such vote and the General Counsel's determination regarding certification under 5 U.S.C. 552b(f)(1). Such determination by the General Counsel shall be made prior to the Commission vote to close a meeting or series of meetings. Further, except with respect to meetings closed under paragraph (c)(2) of this section, the Commission shall make publicly available within one day a full written explanation of its action in closing any meeting, and a list specifying the names and affiliations of all persons expected to attend, except Commission employees and consultants and any stenographer or court reporter attending for the sole purpose of preparing a verbatim transcript. All Commission employees and consultants may attend nonadjudicative portions of any closed meeting and members of Commissioners' personal staffs, the General Counsel and his staff, and the Secretary and his staff may attend the adjudicative portions of any closed meeting except to the extent the notice of a particular closed meeting otherwise specifically provides. Stenographers or court reporters may attend any closed meeting at which their services are required by the Commission.

(2) If a Commission meeting, or portions thereof, may be closed pursuant to 5 U.S.C. 552b(c)(10), the Commission may, by vote recorded at the beginning of the meeting, or portion thereof, close the portion or portions of the meeting so exempt.

(3) Closed meeting transcripts or minutes required by 5 U.S.C. 552b(f)(1) will be released to the public insofar as they contain information that either is not exempt from disclosure under 5 U.S.C. 552b(c), or, although exempt, should be disclosed in the public interest. The Commission will determine whether to release, in whole or in part, the minutes of its executive sessions to consider oral arguments. With regard to all other closed meetings, the General Counsel, without power of redelegation, shall have the authority to determine which portions of the transcripts or minutes may be released. In unusual or difficult cases the General Counsel may, in his sole discretion, refer the question of release to the Commission for determination

(d) The presiding officer shall be responsible for preserving order and decorum at meetings and shall have all powers necessary to that end.

[42 FR 13541, Mar. 11, 1977; 42 FR 15409, Mar. 22, 1977, as amended at 42 FR 62912, Dec. 14, 1977: 43 FR 1937, Jan. 13, 1978; 43 FR 35684, Aug. 11, 1978]

§ 4.16 Privilege against self-incrimination.

Section 2.11 of Pub. L. 91-462 specifically repeals paragraph 7 of section 9 of the Federal Trade Commission Act. Title 18, section 6002, of the United States Code provides that whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to:

(a) A court or grand jury of the United States, (b) an agency of the United States, or (c) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under section 6004, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. Title 18, section 6004, of the United States Code provides that:

(1) In the case of any individual who has been or who may be called to testi-

fy or provide other information at any proceeding before an agency of the United States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of section 6004, an order requiring the individual to give testimony or provide other information which he refused to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in Title 18, section 6002, of the United States Code; (2) an agency of the United States may issue an order under subsection (a) of section 6004 only if in its judgment (i) the testimony or other information from such individual may be necessary to the public interest; and (ii) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

(18 U.S.C. 6002, 6004)

[37 FR 5017, Mar. 9, 1972. Redesignated at 45 FR 36345, May 29, 1980]

§ 4.17 Disqualification of Commissioners.

(a) *Applicability*. This section applies to all motions seeking the disqualification of a Commissioner from any adjudicative or rulemaking proceeding.

(b) *Procedures*. (1) Whenever any participant in a proceeding shall deem a Commissioner for any reason to be disqualified from participation in that proceeding, such participant may file with the Secretary a motion to the Commission to disqualify the Commissioner, such motion to be supported by affidavits and other information setting forth with particularity the alleged grounds for disqualification.

(2) Such motion shall be filed at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification.

(3)(i) Such motion shall be addressed in the first instance by the Commissioner whose disqualification is sought.

(ii) In the event such Commissioner declines to recuse himself or herself from further participation in the proceeding, the Commission shall determine the motion without the participation of such Commissioner.

(c) *Standards*. Such motion shall be determined in accordance with legal standards applicable to the proceeding in which such motion is filed.

(15 U.S.C. 46(g))

[46 FR 45750, Sept. 15, 1981]

PART 5—STANDARDS OF CONDUCT

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AUTHORITY: E.O. 11222 of May 8, 1965, 30 FR 6469, 3 CFR, 1965 Supp., 5 CFR 735.104, unless otherwise noted.

SOURCE: 32 FR 13272, Sept. 20, 1967, unless otherwise noted. Redesignated at 41 FR 54483, Dec. 14, 1976.

Subpart A—General Provisions

§ 5.1 Purpose.

This part establishes standards of ethical conduct for employees and special Government employees in the Federal Trade Commission. It sets forth regulations pertaining to financial interests; acceptance of gifts, entertainment, and favors; outside employment; use of Government information; and teaching, lecturing, and writing. This part also contains instructions on the filing of statements of employment and financial interests by certain employees and special Government employees.

§ 5.2 Authority.

This part is based on Pub. L. 87-849, effective January 21, 1963; Executive Order 11222 of May 8, 1965; and Part 735 of Office of Personnel Management regulations (5 CFR Part 735). This part does not purport to refer to or enumerate every restriction or requirement imposed by statute, regulation, or other authority. The omission of a reference thereto in no way alters the legal effect of such restriction or requirement. This part is not intended to limit whatever statutory authority or responsibility the Chairman may have with respect to employee conduct and discipline.

[32 FR 13272, Sept. 20, 1967. Redesignated at 41 FR 54483, Dec. 14, 1976, and amended at 46 FR 26292, May 12, 1981]

§ 5.3 Presidential policy.

The President's policy, in section 101 of Executive Order No. 11222, is that "Where government is based on the consent of the governed, every citizen is entitled to have confidence in the integrity of his government. Each individual officer, employee, or adviser of government must help to earn and must honor that trust by his own integrity and conduct in all official actions." When signing the order, the President spoke even more specifically of what he conceives to be the duty that this policy imposes on employees of the executive branch: "Government personnel bear a special responsibility to be fair and impartial in their dealings with those who have business with the government. We cannot tolerate conflicts of interest or favoritism—and it is our intention to see that this does not take place in the Federal Government." This policy is based on a recognition that the maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by Government employees, and special Government employees, through informed judgment is essential to assure the proper performance of the Government's business and the maintenance of confidence and respect of the citizens in their Government.

§ 5.4 Definitions.

In this part:

(a) "Commission" means the Federal Trade Commission.

(b) "Employee" means an officer or employee of the Commission, and, insofar as statutory and Executive order provisions are concerned, a Commissioner, but does not include a special Government employee.

(c) "Executive order" means Executive Order 11222.

(d) "Person" means an individual, a corporation, a company, an association, a firm, a partnership, a society, a joint stock company, or any other organization or institution.

(e) "Special Government employee" means a "special Government employee" as defined in section 202 of Title 18 of the United States Code, who is employed in the Federal Trade Commission. In general, this refers to employees appointed to perform temporary duties on either a full-time or intermittent basis for not to exceed 130 days during any period of 365 consecutive days.

(f) "General Counsel" means the General Counsel or the General Counsel's designee.

(Sec. 6(g), 38 Stat. 721 (15 U.S.C. 46(g)); 80 Stat. 383, as amended; 81 Stat. 54 (5 U.S.C. 552); 92 Stat. 1824, as amended; E.O. 11222 of May 8, 1965, (30 FR 6469; 3 CFR 1964-1965 Comp. p. 306); 5 CFR 734.103; 5 CFR 735.104)

[32 FR 13272, Sept. 20, 1967. Redesignated at 41 FR 54483, Dec. 14, 1976, and amended at 48 FR 20044, May 4, 1983]

§ 5.5 Interpretation and advisory services.

The General Counsel shall serve as counselor for the Commission on matters covered by the regulations in this part. The regional directors shall serve as deputy counselors serving their regions. They shall be responsible for giving authoritative advice and guidance to each employee and special Government employee who seeks such advice or guidance on questions of conflicts of interest or other matters pertaining to the regulations of this part. Deputy counselors may seek advice or guidance concerning the interpretation of the regulations of this part from the General Counsel.

(Sec. 6(g), 38 Stat. 721 (15 U.S.C. 46(g)); 80 Stat. 383, as amended; 81 Stat. 54 (5 U.S.C. 552); 92 Stat. 1824, as amended; E.O. 11222 of May 8, 1965, (30 FR 6469; 3 CFR 1964-1965 Comp. p. 306); 5 CFR 734.103; 5 CFR 735.104)

[43 FR 25334, June 12, 1978, as amended at 48 FR 20044, 20046, May 4, 1983]

§ 5.6 Procedures for reporting and resolving conflicts of interest.

(a) An employee or special Government employee who believes that his assignment to a matter may result in a conflict of interest or the appearance of a conflict of interest shall report all relevant facts to his bureau director or office head. Notwithstanding this section, conflicts of interest or apparent conflicts of interest arising in the immediate office of an individual Commissioner shall be reported and resolved as that Commissioner determines, and such determination shall be final.

(b) When a bureau director or office head believes that the assignment of an employee or special Government employee or special Government employee under his supervision to a particular matter may result in a conflict of interest or the appearance of a conflict of interest, the bureau director or office head shall, if possible, resolve the matter through minor remedial action (such as reassignment of the matter to another employee) with the consent of the affected employee. The existence of the conflict or apparent conflict and the nature of the remedial action taken shall be reported to the General Counsel as soon as possible but no later than 30 days after the existence of the conflict or apparent conflict has surfaced. If the conflict or apparent conflict cannot be so resolved, it shall be reported immediately to the General Counsel.

(c) Except for determinations by the Executive Director pursuant to § 5.8, the General Counsel may resolve a conflict of interest or the appearance of a conflict of interest by such remedial action as is within the authority of the General Counsel.

(d) Where there is substantial doubt concerning the existence of a conflict of interest or the appearance of a conflict of interest, the type of remedial action which is required, or any other matter involving the interpretation of the regulations in this part, the matter may be referred to the General Counsel for advice and recommendations.

(Sec. 6(g), 38 Stat. 721 (15 U.S.C. 46(g)); 80 Stat. 383, as amended; 81 Stat. 54 (5 U.S.C. 552); 92 Stat. 1824, as amended; EO 11222 of May 8, 1965, (30 FR 6469; 3 CFR 1964-1965 Comp. p. 306); 5 CFR 734.103; 5 CFR 735.104)

[43 FR 25334, June 12, 1978; 43 FR 26426, June 20, 1978, as amended at 48 FR 20044, 20046, May 4, 1983; 50 FR 53306, Dec. 31, 1985]

§ 5.7 Disciplinary or other remedial action by the Chairman.

(a) Where a conflict of interest or the appearance of a conflict of interest cannot be resolved at a lower level with the consent of the affected employee, as prescribed by § 5.6, the General Counsel shall report the matter to the Chairman. The individual concerned shall be provided an opportunity to explain the conflict or appearance of conflict, or, if appropriate, to seek resolution pursuant to § 5.8.

(b) If, after consideration of the employee's explanation, the Chairman determines that remedial action is required, the Chairman will initiate action to eliminate the conflict or appearance of conflict of interest. Remedial action may include, but is not limited to:

(1) Change in assigned duties;

(2) Divestment of the conflicting interest by the employee;

(3) Disciplinary action; or

(4) Disqualification for a particular assignment.

(c) The remedial action authorized under this section shall include disciplinary action where the Chairman deems it appropriate, and such action shall be in addition to any penalty prescribed by law.

(d) Remedial action, whether disciplinary or otherwise, shall be effected in accordance with any applicable laws, executive orders, and regulations.

[43 FR 25334, June 12, 1978, as amended at 48 FR 20046, May 4, 1983]

§ 5.8 Exemption of insubstantial financial conflicts.

(a) An employee or special Government employee will not be subject to remedial or disciplinary action under § 5.7(b) or to criminal prosecution under 18 U.S.C. 208(a), if he makes a full disclosure in writing to the official responsible for his appointment of the nature and circumstances of the particular matter involved and of his conflicting financial interest relating therto, and receives in advance a written detemination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from the employee or special Government employee.

(b) For the purposes of paragraph (a) of this section, the "official responsible for appointment" shall be the Executive Director in all cases where the employee is classified at grade GS-15 or below, or at a comparable pay level, except that each Commissioner shall be the "official responsible for appointment" of advisors in the Commissioner's immediate office.

(c) In all other cases, the Chairman shall be the "official responsible for appointment."

(d) The financial interests described below are exempted from the provisions of § 5.7 and 18 U.S.C. 208(a) as being too remote or too inconsequential to affect the integrity of an employee's services: Stocks and bonds of a diversified mutual fund or investment company *Provided*, That the fair market value of the employee's holdings in the fund or company does not exceed one percent of the value of its reported assets.

(15 U.S.C. 46(g); 18 U.S.C. 208(b))

[43 FR 25334, June 12, 1978, as amended at 44 FR 69284, Dec. 3, 1979]

§ 5.9 Publication of regulations.

Each employee and special Government employee shall be furnished a copy of the regulations in this part within 90 days after their approval by the Office of Personnel Management. Each new employee and special Government employee shall be furnished a copy at the time of his entrance on duty. At least once each year, an appropriate notice shall be issued by the General Counsel to bring the provisions of the regulations in this part to the attention of each employee and special Government employee.

[32 FR 13272, Sept. 20, 1967. Redesignated at 41 FR 54483, Dec. 14, 1976, and at 43 FR 25334, Aug. 9, 1978, and amended at 46 FR 26292, May 12, 1981; 48 FR 20046, May 4, 1983]

Subpart B—Ethical and Other Conduct and Responsibilities of Employees

§ 5.10 Proscribed actions.

An employee shall avoid any action, whether or not specifically prohibited by this part, which might result in, or create the appearance of:

(a) Using public office for private gain;

(b) Giving preferential treatment to any person;

(c) Impeding Government efficiency or economy;

(d) Losing complete independence or impartiality;

(e) Making a Government decision outside official channels; or

(f) Affecting adversely the confidence of the public in the integrity of the Government.

§ 5.11 Gifts, entertainment, and favors.

(a) Except as provided in paragraphs (b) and (e) of this section, an employee shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from a person who:

(1) Has, or is seeking to obtain, contractual or other business or financial relations with the Commission.

(2) Conducts operations or activities that are regulated by or are otherwise subject to the jurisdiction of the Commission.

(3) Has interests that may be substantially affected by the performance or nonperformance of his official duty.

(b) As exceptions to paragraph (a) of this section, an employee shall be permitted to:

(1) Accept gifts, gratuities, favors, entertainment, loans, or other things of monetary value from members of his immediate family (i.e., parents, children, or spouse) when the circumstances make it clear that it is the family relationship rather than the business of the persons concerned which is the motivating factor;

(2) Accept food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting or other meeting or on an inspection tour where the employee may properly be in attendance;

(3) Accept loans from banks or other financial institutions on customary terms to finance proper and usual activities of an employee, such as home mortgage loans; and

(4) Accept unsolicited advertising or promotional material, such as pens, pencils, note pads, calendars, and other items of nominal intrinsic value.

(c) An employee shall not solicit a contribution from another employee for a gift to an official superior, make a donation as a gift to an official superior, or accept a gift from an employee receiving less pay than himself (5 U.S.C. 7351). However, this paragraph does not prohibit a voluntary gift of nominal value or donation in a nominal amount made on a special occasion such as marriage, illness, or retirement.

(d) An employee shall not accept a gift, present, decoration, or other thing from a foreign government unless authorized by Congress as provided by the Constitution and in 5 U.S.C. 7342.

(e) Neither this section nor § 5.12 precludes an employee from receipt of bona fide reimbursement, unless prohibited by law, for expenses of travel and such other necessary subsistence as is compatible with this part for which no Government payment or reimbursement is made. However, this paragraph does not allow an employee to be reimbursed, or payment to be made on his behalf, for excessive personal living expenses, gifts, entertainment, or other personal benefits, nor does it allow an employee to be reimbursed by a person for travel on official business under Commission orders when reimbursement is proscribed by Decision B-128527 of the Comptroller General dated March 7, 1967.

[32 FR 13272, Sept. 20, 1967. Redesignated at 41 FR 54483, Dec. 14, 1976, and amended at 50 FR 53306, Dec. 31, 1985]

§ 5.12 Outside employment and other activity.

(a) An employee shall not engage in outside employment or other outside activity not compatible with the full and proper discharge of the duties and responsibilities of his Government employment. Incompatible activities include but are not limited to:

(1) Acceptance of a fee, compensation, gift, payment of expense, or any other thing of monetary value in circumstances in which acceptance may result in, or create the appearance of, conflicts of interest;

(2) Outside employment which tends to impair his mental or physical capacity to perform his Government duties and responsibilities in an acceptable manner; or

(3) Outside employment or other outside activity which may tend to bring discredit upon the Government or the Commission.

(b) An employee shall not receive any salary or anything of monetary value from a private source as compensation for his services to the Government (18 U.S.C. 209).

(c) Employees are encouraged to engage in teaching, lecturing, and writing that is not prohibited by law, the Executive order, or this part. However, an employee shall not, either for or without compensation, engage in teaching, lecturing, or writing, including teaching, lecturing, or writing for the purpose of the special preparation of a person or class of persons for an examination of the Office of Personnel Management or Board of Examiners for the Foreign Service, that is dependent on information obtained as a result of his Government employment, except when that information has been made available to the general public or will be made available on request, or when the Chairman gives written authorization for the use of nonpublic information on the basis that the use is in the public interest. In addition, an officer or employee who is a Presidential appointee covered by section 401(a) of the Executive order shall not receive compensation or anything of monetary value for any consultation, lecture, discussion, writing, or appearance the subject matter of which is devoted substantially to the responsibilities, programs, or operations of the Commission, or which draws substantially on official data or ideas which have not become part of the body of public information.

(d) [Reserved]

(e) This section does not preclude an employee from:

(1) Receipt of bona fide reimbursement, unless prohibited by law, for actual expenses for travel and such other necessary subsistence as is compatible with this chapter for which no Government payment or reimbursement is made. However, an employee may not be reimbursed, and payment may not be made on his behalf, for excessive personal living expenses, gifts, entertainment, or other personal benefits.

(2) Participation in the activities of national or State political parties not proscribed by law.

(3) Participation in the affairs of or acceptance of an award for a meritorious public contribution or achievement given by a charitable, religious, professional, social, fraternal, nonprofit educational and recreational, public service, or civic organization.

(f) Before engaging in outside employment, an employee, other than a Commissioner, must obtain the written permission of the General Counsel. Request for approval shall be sent through normal supervisory channels and shall include the following information:

(1) Name of the person, group, or organization for whom the work is to be performed.

(2) Nature of the services to be rendered.

(3) Proposed hours of work (if regularly scheduled) or approximate dates of employment.

(4) Employee's certification as to whether the outside employment (including teaching, writing, or lecturing) will depend in any way on information obtained as a result of the employee's official Government position.

[32 FR 13272, Sept. 20, 1967, as amended at 33 FR 11538, Aug. 14, 1968. Redesignated at 41 FR 54483, Dec. 14, 1976, and amended at 46 FR 26292, May 12, 1981; 48 FR 20046, May 4, 1983; 50 FR 53306, Dec. 31, 1985]

§ 5.13 Financial interests.

(a) An employee shall not:

(1) Have a direct or indirect financial interest that conflicts substantially, or appears to conflict substantially, with his Government duties and responsibilities; or

(2) Engage in, directly or indirectly, a financial transaction as a result of, or primarily relying on, information obtained through his Government employment.

(b) This section does not preclude an employee from having a financial interest or engaging in financial transactions to the same extent as a private citizen not employed by the Government so long as it is not prohibited by law, the Executive order, or the regulations in this part.

§ 5.14 Criminal sanction for conflict of interest.

Pursuant to Pub. L. 87-849 (18 U.S.C. 208), no employee or special Government employee shall, except as permitted by § 5.8, participate "personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner, or employee, or any person or organization with whom he is negotiating or has any arrangement concerning propsective employment, has a financial interest." Conviction under 18 U.S.C. 208 carries a fine of not more than $10,000 or imprisonment for not more than two years, or both.

[43 FR 25334, June 12, 1978; 43 FR 26426, June 20, 1978; 50 FR 53306, Dec. 31, 1985]

§ 5.15 Use of Government property.

An employee shall not directly or indirectly use, or allow the use of, Government property of any kind, including property leased to the Government, for other than officially approved activities. An employee has a positive duty to protect and conserve Government property, including equipment, supplies, and other property entrusted or issued to him.

[32 FR 13272, Sept. 20, 1967. Redesignated at 41 FR 54483, Dec. 14, 1976, and at 43 FR 25334, June 12, 1978]

§ 5.16 Misuse of information.

For the purpose of furthering a private interest, an employee shall not, except as provided in § 5.12(c), directly or indirectly use, or allow the use of, official information obtained through or in connection with his Government employment which has not been made available to the general public.

[32 FR 13272, Sept. 20, 1967. Redesignated at 41 FR 54483, Dec. 14, 1976, and at 43 FR 25334, June 12, 1978]

§ 5.17 Indebtedness.

An employee shall pay each just financial obligation in a proper and timely manner, especially one imposed by law such as Federal, State, or local taxes. For the purpose of this section, a "just financial obligation" means one acknowledged by the employee or reduced to judgment by a court, and "in a proper and timely manner" means in a manner which does not, under the circumstances, reflect adversely on the Government as his employer. In the event of dispute between an employee and an alleged creditor, this section does not require the Commission to determine the validity or amount of the disputed debt.

[32 FR 13272, Sept. 20, 1967. Redesignated at 41 FR 54483, Dec. 14, 1976, and at 43 FR 25334, June 12, 1978]

§ 5.18 Gambling, betting, and lotteries.

An employee shall not participate, while on Government-owned or leased property or while on duty for the Government, in any gambling activity including the operation of a gambling device, in conducting a lottery or pool, in a game for money or property, or in selling or purchasing a numbers slip or ticket. However, this section does not preclude activities:

(a) Necessitated by an employee's law enforcement duties; or

(b) Under section 3 of Executive Order 10927, pertaining to fund-rais-

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ing activities conducted by employee organizations.

[32 FR 13272, Sept. 20, 1967. Redesignated at 41 FR 54483, Dec. 14, 1976, and at 43 FR 25334, June 12, 1978]

§ 5.19 Miscellaneous statutory provisions.

(a) All employees shall acquaint themselves with each statute that relates to their ethical and other conduct as employees of the Commission and of the Government. The attention of employees is directed to the following statutory provisions:

(1) House Concurrent Resolution 175, 85th Congress, 2d sess., 72 Stat. B12, the "Code of Ethics for Government Service."

(2) Chapter 11 of Title 18, United States Code, relating to bribery, graft, and conflicts of interest, as appropriate to the employees concerned.

(3) The prohibition against lobbying with appropriated funds (18 U.S.C. 1913).

(4) The prohibitions against disloyalty and striking (5 U.S.C. 7311, 18 U.S.C. 1918).

(5) The prohibitions against (i) the disclosure of classified information (18 U.S.C. 798, 50 USC 783); and (ii) the disclosure of confidential information (18 U.S.C. 1905).

(6) The provisions relating to the habitual use of intoxicants to excess (5 U.S.C. 7352).

(7) The prohibition against the misuse of a Government vehicle (31 U.S.C. 638a(c)).

(8) The prohibition against the misuse of the franking privilege (18 U.S.C. 1719).

(9) The prohibition against the use of deceit in an examination or personnel action in connection with Government employment (18 U.S.C. 1917).

(10) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(11) The prohibition against multilating or destroying a public record (18 U.S.C. 2071).

(12) The prohibition against counterfeiting and forging transportation requests (18 U.S.C. 508).

(13) The prohibitions against: (i) Embezzlement of Government money or property (18 U.S.C. 641); (ii) failing to account for public money (18 U.S.C. 643); and (iii) embezzlement of the money or property of another person in the possession of an employee by reason of his employment (18 U.S.C. 654).

(14) The prohibition against unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(15) The prohibition against political activities in Subchapter III of Chapter 73 of Title 5, United States Code and 18 U.S.C. 602, 603, 607, and 608.

(16) The prohibition against an employee acting as the agent of a foreign principal registered under the Foreign Agents Registration Act (18 U.S.C. 219).

(17) The prohibitions against acceptance of excessive honorariums (2 U.S.C. 441i).

(b) If an employee has reason to believe that a violation of a statute listed in paragraph (a) of this section or other relevant statute has occurred, the employee should bring the matter to the attention of the Chairman through the General Counsel.

(Sec. 6(g), 38 Stat. 721 (15 U.S.C. 46(g)); 80 Stat. 383, as amended; 81 Stat. 54 (5 U.S.C. 552); 92 Stat. 1824, as amended; E.O. 11222 of May 8, 1965, (30 FR 6469; 3 CFR 1964-1965 Comp. p. 306); 5 CFR 734.103; 5 CFR 735.104)

[43 FR 25334, June 12, 1978, as amended at 43 FR 31129, July 20, 1978; 48 FR 20045, May 4, 1983; 50 FR 53306, Dec. 31, 1985]

Subpart C—Ethical and Other Conduct and Responsibilities of Special Government Employees

§ 5.21 Application of Subpart B of this part to special Government employees.

All provisions of Subpart B of this part except § 5.12(f) shall apply to special Government employees. In addition, the regulations in this Subpart C shall apply.

§ 5.22 Use of Government employment.

A special Government employee shall not use his Government employment for a purpose that is, or gives the appearance of being, motivated by the desire for private gain for himself or another person, particularly one with whom he has family, business, or financial ties.

§ 5.23 Use of inside information.

Except as provided in § 5.12(c), a special Government employee shall not use inside information obtained as a result of his Government employment for private gain for himself or another person either by direct action on his part or by counsel, recommendation, or suggestion to another person, particularly one with whom he has family, business, or financial ties. For the purpose of this section, "inside information" means information obtained under Government authority which has not become part of the body of public information.

§ 5.24 Coercion.

A special Government employee shall not use his Government employment to coerce, or give the appearance of coercing, a person to provide financial benefit to himself or another person, particularly one with whom he has family, business, or financial ties.

§ 5.25 Gifts, entertainment, and favors.

Except as provided in § 5.11(b), a special Government employee, while so employed or in connection with his employment, shall not receive or solicit from a person having business with his agency anything of value as a gift, gratuity, loan, entertainment, or favor for himself or another person, particularly one with whom he has family, business, or financial ties.

§ 5.26 Miscellaneous statutory provisions.

Each special Government employee shall acquaint himself with each statute that relates to his ethical and other conduct as a special Government employee of the Commission and of the Government. The attention of special Government employees is directed to those statutory provisions listed in § 5.19.

Subpart D—Financial Disclosures

AUTHORITY: Sec. 6(g), 38 Stat. 721 (15 U.S.C. 46(g)); 80 Stat. 383, as amended; 81 Stat. 54 (5 U.S.C. 552); 92 Stat. 1824, as amended; E.O. 11222 of May 8, 1965, (30 FR 6469; 3 CFR 1964-1965 Comp. p. 306); 5 CFR 734.103; 5 CFR 735.104.

§ 5.31 Public financial disclosure reports under the Ethics in Government Act.

(a) The provisions of this section apply only to public financial disclosure reports required by Title II of the Ethics in Government Act of 1978, Pub. L. 95-521, as amended. Commission members and employees required to file under this section need not file statements of employment and financial interests under § 5.32 and they are not subject to the provisions of §§ 5.33 through 5.42.

(b) For purposes of this section, the Designated Agency Ethics Official is the Assistant General Counsel.

(c) The following Commission members and employees must file public financial disclosure reports pursuant to Title II of the Ethics in Government Act:

(1) The Chairman;

(2) Each Commissioner;

(3) Each employee (i) who is a member of the Senior Executive Service, or (ii) whose position is classified at GS-16 or above of the General Schedule, or (iii) whose rate of basic pay is fixed (other than under the General Schedule) at a rate equal to or greater than the minimum rate of basic pay fixed for GS-16 (Step 1);

(4) Each employee who is an administrative law judge appointed pursuant to 5 U.S.C. 3105;

(5) Each employee, regardless of grade or pay level, who is in a position which is excepted from competitive service by reason of being of a confidential or policymaking character (except individuals or groups excluded by action of the Director of the Office of Government Ethics); and

(6) The Designated Agency Ethics Official.

(d) Reports under this section must be filed on the form prescribed by the Office of Government Ethics and in accordance with the regulations promulgated, and from time to time amended, by the Office of Government Ethics as set forth in 5 CFR Part 734. Copies of the form are available from the Designated Agency Ethics Official.

(e) Reports under this section must be filed according to the time schedules set forth in 5 CFR Part 734.

(f) Reports under this section, except those filed by the Designated Agency Ethics Official, must be filed with the Designated Agency Ethics Official. The Designated Agency Ethics Official must file his report with the Chairman.

(g) The Designated Agency Ethics Official shall administer the public financial disclosure reports program under this section, shall receive the reports as indicated in § 5.31(f), shall review them, and shall provide advice and counsel regarding matters relating to Part II of the Ethics in Government Act and its implementing regulations. His duties and responsibilities are set forth in more detail in 5 CFR Part 738 which is promulgated, and from time to time amended, by the Office of Government Ethics.

[48 FR 20045, May 4, 1983]

§ 5.32 Statements of employment and financial interests under Executive Order 11222.

(a) The provisions of this section and §§ 5.33 through 5.42 apply only to individuals required to file statements of employment and financial interests under Executive Order 11222, sections 402-406 (May 8, 1965) and its implementing regulations as set forth in 5 CFR Part 735, Subpart D.

(b) Individuals required to file financial disclosure reports under § 5.31 need not file statements under this section and are not subject to the provisions of §§ 5.33 through 5.42.

(c) If not required to file under § 5.31, the following employees, whether or not serving in an acting capacity, shall submit statements to the Executive Director:

(1) The Executive Assistant to the Executive Director;

(2) The Attorney Advisor to the Executive Director; and

(3) The Director of Equal Employment Opportunity.

(d) If not required to file under § 5.31, the following employees, whether or not serving in an acting capacity, shall submit statements to the General Counsel:

(1) The Director and Deputy Director of the Office of Public Affairs;

(2) The Chief Presiding Officer;

(3) The Director of the Office of Congressional Relations;

(4) Directors of the Regional Offices;

(5) Advisors to the Commissioners, except that each Commissioner in the Commissioner's discretion may direct otherwise;

(6) Deputy Assistant General Counsels; and

(7) Assistants to the General Counsel.

(e) If not required to file under § 5.31, the following employees of the Bureaus of Competition, Consumer Protection, and Economics, whether or not serving in an acting capacity, shall submit statements to their Bureau Director:

(1) Assistant Directors and Associate Directors;

(2) Deputy Assistant Directors;

(3) Executive Assistants to the Director and Assistants to the Director; and

(4) Assistants to the Deputy Director.

(f) If not required to file under § 5.31, the following employees, whether or not serving in an acting capacity, shall submit statements to the Deputy Executive Director for Management:

(1) The Director of the Division of Procurement and General Services;

(2) The Director of the Division of Budget and Finance;

(3) The Director of the Division of Personnel; and

(g) If not required to file under § 5.31, the following employees, whether or not serving in an acting capacity, shall submit statements to the Deputy Executive Director for Planning and Information:

(1) The Director of the Division of Automated Systems;

(2) The Director of the Library; and

(3) The Director of the Division of Information Services.

(h) Presiding Officers designated under § 1.13(c) of Part 1 shall submit statements to the Chief Presiding Officer.

(i) Assistant Directors of the Regional Offices, whether or not serving in an acting capacity, shall submit statements to their Regional Office Director.

(j) The Executive Director, the General Counsel, or a Bureau Director may require any of the following employees under his or her supervision, in addition to those specified in paragraphs (c) through (i) of this section, to file statements pursuant to this section and to submit the statements to him or her:

(1) An employee classified at GS-13 or above, or at a comparable pay level under another authority, whose position meets the criteria established by the Office of Personnel Management in 5 CFR 735.403; and

(2) An employee classified below GS-13, or at a comparable pay level under another authority, who is in a position which otherwise meets the criteria of 5 CFR 735.403 and whose requirement to file statements has been specifically justified in writing by his or her supervising official to the Office of Personnel Management as essential to protect the integrity of the Government and to avoid the employee's involvement in possible conflicts of interest. The names of employees designated to file statements pursuant to this paragraph shall be reported to the General Counsel.

(k) An employee who feels that his or her position has been improperly designated as one requiring submission of a statement of employment and financial interests has recourse to the Commission's grievance procedures set forth in Chapter 5-771 of the Commission's Administrative Manual.

[48 FR 20045, May 4, 1983, as amended at 48 FR 23172, May 24, 1983; 50 FR 53307, Dec. 31, 1985]

§ 5.33 Time for submission of statements.

An employee required to submit a statement of employment and financial interests under the requirements in this part shall submit that statement not later than:

(a) Thirty days after the effective date of the regulations in this part if the employee entered on duty in a position listed in § 5.32 on or before that effective date; or

(b) Thirty days after his entrance on duty in a position listed in § 5.32, but not earlier than 30 days after the effective date, if the employee entered on duty in that position after the effective date.

However, the provisions of this section shall not apply to an employee who has submitted a statement of employment and financial interests or a supplementary statment at any time during the twelve months preceding the date he would otherwise be required to submit a statement under this section.

[43 FR 25335, June 12, 1978. Redesignated at 48 FR 20046, May 4, 1983]

§ 5.34 Supplementary statements.

Changes in, or additions to, the information contained in an employee's statement of employment and financial interests shall be reported to the person designated in § 5.32 in a supplementary statement as of September 30 each year. If no changes or additions occur, a negative report is required.

[43 FR 25335, June 12, 1978. Redesignated at 48 FR 20046, May 4, 1983]

§ 5.35 Interests of employees' relatives.

The interest of a spouse, minor child, or other member of an employee's immediate household is considered to be an interest of the employee. For the purpose of this section, "member of an employee's immediate household" means those blood relations who are residents of the employee's household.

[32 FR 13272, Sept. 20, 1967. Redesignated at 41 FR 54483, Dec. 14, 1976, and at 48 FR 20046, May 4, 1983]

§ 5.36 Information not known by employees.

If any information required to be included on a statement of employment and financial interests or supplementary statement, including holdings placed in trust, is not known to the employee but is known to another person, the employee shall request that other person to submit information in his behalf.

[32 FR 13272, Sept. 20, 1967. Redesignated at 41 FR 54483, Dec. 14, 1976, and at 48 FR 20046, May 4, 1983]

§ 5.37 Information prohibited.

This part does not require an employee to submit on a statement of employment and financial interests or supplementary statement any information relating to the employee's connection with, or interest in, a professional society or a charitable, religious, social, fraternal, recreational, public service, civic, or political organization or a similar organization not conducted as a business enterprise. For the purpose of this section, educational and other institutions doing research and development or related work involving grants of money from or contracts with the Government are deemed "business enterprises" and are required to be included in an employee's statement of employment and financial interests.

[32 FR 13272, Sept. 20, 1967. Redesignated at 41 FR 54483, Dec. 14, 1976, and at 48 FR 20046, May 4, 1983]

§ 5.38 Review of employees' statements.

(a) Persons to whom the statements and supplementary statements are submitted pursuant to § 5.32 are responsible for ensuring timely submission of the statements and conducting a review of them, except that the General Counsel shall refer to a Commissioner for review and appropriate action any statements filed by that Commissioner's legal advisors, or take other action as the Commissioner may direct. Action by a Commissioner concerning any statements filed by that Commissioner's advisors shall be final.

(b) Upon completion of review, all statements received by the Executive Director, the Directors of the Bureaus of Competition, Consumer Protection, and Economics, the Deputy Executive Directors, the Chief Presiding Officer, and the Regional Office Directors shall be forwarded to the General Counsel for safekeeping.

(c) If an employee fails to file a statement or supplementary statement by the required filing date, the Bureau Director or Office head responsible for his supervision shall notify the General Counsel of the failure as soon as possible but no later than 30 days after the required filing date.

(d) Conflicts or appearances of conflicts discovered as the result of the review of the statements pursuant to this section shall be dealt with in the manner set forth in §§ 5.6 through 5.8

[43 FR 25336, June 12, 1978, as amended at 46 FR 26293, May 12, 1981. Redesignated and amended at 48 FR 20046, May 4, 1983]

§ 5.39 Confidentiality of employees' statements.

(a) Each statement of employment and financial interests, and each supplementary statement, shall be held in confidence. During the course of review, only the person to whom the statement is submitted or properly referred, the Chairman (or the Chairman's designee), the Executive Director (or the Executive Director's designee), and the General Counsel shall be permitted to view the statements.

(b) Upon completion of the review process, the statements and supplementary statements shall be retained in confidence by the General Counsel. No access shall be allowed to, and no information shall be disclosed from, a statement except to carry out the purposes of this part. An agency may not disclose information from a statement except as the Office of Personnel Management or the Chairman may determine for good cause shown.

[43 FR 25336, June 12, 1978, as amended at 46 FR 26293, May 12, 1981. Redesignated and amended at 48 FR 20046, May 4, 1983]

§ 5.40 Effect of employee's statements on other requirements.

The statements of employment and financial interests and supplementary statements required of employees are in addition to and not in substitution for or in derogation of, any similar requirement imposed by law, order, or regulation. The submission of a statement or supplementary statement by an employee does not permit him or any other person to participate in a matter in which his or the other person's participation is prohibited by law, order, or regulation.

[32 FR 13272, Sept. 20, 1967. Redesignated at 41 FR 54483, Dec. 14, 1976, at 43 FR 25336, June 12, 1978, and at 48 FR 20046, May 4, 1983]

§ 5.41 Specific provisions for special Government employees.

(a) Except as provided in paragraph (b) of this section, each special Government employee shall submit a statement of employment and financial interests that reports:

(1) All other employment; and

(2) The financial interests of the special Government employee that relate either directly or indirectly to his duties and responsibilities as a special Government employee.

(b) The Chairman may waive the requirement in paragraph (a) of this section for the submission of a statement of employment and financial interest in the case of a special Government employee who is not a consultant or an expert if the Chairman finds that the duties of the position held by that special Government employee are of a nature and at such a level of responsibility that the submission of a statement by the incumbent is not necessary to protect the integrity of the Government. For the purpose of this paragraph, "consultant" and "expert" have the meanings given those terms by Chapter 304 of the Federal Personnel Manual.

(c) A statement of employment and financial interests required to be submitted under this section shall be submitted to the General Counsel not later than the time of employment of the special Government employee. Each special Government employee shall keep such statement current throughout his employment with the Commission by the submission of supplementary statements.

[43 FR 25336, June 12, 1978. Redesignated and amended at 48 FR 20046, May 4, 1983]

§ 5.42 Reviewing statements of special Government employees.

(a) All statements submitted in accordance with § 5.42 shall be reviewed initially by the bureau director or office head who has supervisory authority over the special Government employee. Following this review, all statements shall be returned to the General Counsel for safekeeping.

(b) If there is a conflict or apparent conflict, the procedures specified in §§ 5.6 through 5.8 shall be followed.

[43 FR 25336, June 12, 1978. Redesignated and amended at 48 FR 20046, May 4, 1983]

Subpart E—Disciplinary Actions Concerning Postemployment Conflict of Interest

AUTHORITY: 15 U.S.C. 41 *et seq.*

SOURCE: 46 FR 26050, May 11, 1981 unless otherwise noted.

§ 5.51 Scope and applicability.

These regulations establish procedures for investigating and determining alleged violations of 18 U.S.C. 207 (a), (b) and (c) (Postemployment restrictions applicable to federal employees) or regulations issued by the Office of Personnel Management set forth in 5 CFR Part 737, reflecting the joint views of the Office of Government Ethics and the Department of Justice as to the requirements of 18 U.S.C. 207.

§ 5.52 Nonpublic proceedings.

Any investigation or proceedings held under this part shall be nonpublic unless the respondent specifically requests otherwise, except to the extent required by the Freedom of Information Act (5 U.S.C. 552) or by the Sunshine Act (5 U.S.C. 552b). However, the presiding official's initial decision and any final decision of the Commission shall be placed on the public record, except that information may be designated *in camera* in accordance with § 3.45 of the Commission's Rules of Practice.

§ 5.53 Initiation of investigation.

(a) Investigations under this part may be initiated upon the submission by any person of a written statement to the Secretary setting forth sufficient information to indicate a possible violation of 18 U.S.C. 207 or by the Commission on its own initiative when a possible violation is indicated by information within the Commission's possession.

(b) At the direction of the Commission, the General Counsel shall investigate any alleged violation of 18 U.S.C. 207.

§ 5.54 Referral to the Office of Government Ethics and to the Department of Justice.

(a) The General Counsel shall make a preliminary determination of whether the matter appears frivolous and, if not, shall expeditiously transmit any available information to the Director of the Office of Government Ethics and to the Criminal Division, Department of Justice.

(b) Unless the Department of Justice communicates to the Commission that it does not intend to initiate criminal prosecution, the General Counsel shall coordinate any investigation or proceeding under this part with the Department of Justice in order to avoid prejudicing criminal proceedings.

§ 5.55 Conduct of investigation.

(a) The General Counsel may (1) exercise the authority granted in § 2.5 of the Commission's Rules of Practice to administer oaths and affirmations; and (2) conduct investigational hearings pursuant to Part 2 of these rules. He may also recommend that the Commission issue compulsory process in connection with an investigation under this section.

(b) Witnesses in investigations shall have the rights set forth in § 2.9 of the Commission's Rules of Practice.

§ 5.56 Disposition.

(a) Upon the conclusion of an investigation under this part, the General Counsel shall forward to the Commission a summary of the facts disclosed by the investigation along with a recommendation as to whether the Commission should issue an order to show cause pursuant to § 5.57.

(b) When the former government employee involved is an attorney, the General Counsel shall also recommend whether the matter should be referred to the disciplinary committee of the bar(s) of which the attorney is a member.

§ 5.57 Order to show cause.

(a) Upon a Commission determination that there exists reasonable cause to believe a former government employee has violated 18 U.S.C. 207, the Commission may issue an order requiring the former employee to show cause why sanctions should not be imposed.

(b) The show cause order shall contain (1) the statutory provisions alleged to have been violated and a clear and concise description of the acts of the former employee that are alleged to constitute the violation; (2) notice of the respondent's right to submit an answer and request a hearing, and the time and manner in which the request is to be made; and (3) a statement of the sanctions that may be imposed pursuant to § 5.67 of this part.

(c) Subsequent to the issuance of an order to show cause, any communications to or from the Commission or any member of the Commission shall be governed by the *ex parte* provisions of § 4.7 of the Commission's Rules of Practice. 16 CFR 4.7.

§ 5.58 Answer and request for a hearing.

(a) An answer and request for a hearing must be filed with the Secretary of the Commission within thirty (30) days after service of the order to show cause.

(b) In the absence of good cause shown, failure to file an answer and request for a hearing within the specified time limit (1) will be deemed a waiver of the respondent's right to contest the allegations of the show cause order or request a hearing and (2) shall authorize the Commission to find the facts to be as alleged in the show cause order and enter a final decision providing for the imposition of such sanctions specified in § 5.67 as the Commission deems appropriate.

(c) An answer shall contain (1) a concise statement of the facts or law constituting each ground of defense and (2) specific admission, denial, or explanation of each fact alleged in the show cause order or, if the respondent is without knowledge thereof, a statement to that effect. Any allegations of a complaint not answered in this manner will be deemed admitted.

(d) Hearings shall be deemed waived as to any facts in the show cause order that are specifically admitted or deemed to be admitted as a result of respondent's failure to deny them. Those portions of respondent's answer, together with the show cause order, will provide a record basis for initial decision by the Administrative Law Judge or for final decision by the Commission.

(e) If all material factual allegations of the show cause order are specifically admitted or have been deemed admitted in accordance with paragraph (c) of this section, the Commission will decide the matter on the basis of the allegations set forth in the show cause order and respondent's answer.

§ 5.59 Presiding official.

(a) Upon the receipt of an answer and request for a hearing, the Secretary shall refer the matter to the Chief Administrative Law Judge, who shall appoint an Administrative Law Judge to preside over the hearing and shall notify the respondent and the General Counsel as to the person selected.

(b) The powers and duties of the presiding official shall be as set forth in § 3.42(b) through (h) of the Commission's Rules of Practice.

§ 5.60 Scheduling of hearing.

The presiding official shall fix the date, time and place of the hearing. The hearing shall not be scheduled earlier than fifteen days after receipt of the respondent's answer and request for a hearing. In fixing the time, date and place of the hearing, the presiding official shall give due regard to the respondent's need for adequate time to prepare a defense and an expeditious resolution of allegations that may be damaging to his or her reputation.

§ 5.61 Prehearing procedures; motions; interlocutory appeals; summary decision; discovery; compulsory process.

Because of the nature of the issues involved in proceedings under this part, the Commission anticipates that extensive motions, prehearing proceedings and discovery will not be required in most cases. For this reason, detailed procedures will not be established under this part. However, to the extent deemed warranted by the presiding official, prehearing conferences, motions, interlocutory appeals, summary decisions, discovery and compulsory process shall be permitted and shall be governed, where appropriate, by the provisions set forth in Subparts C and D, Part 3, of the Commission's Rules of Practice.

§ 5.62 Hearing rights of respondent.

In any hearing under this subpart, the respondent shall have the right (a) to be represented by counsel; (b) to present and cross-examine witnesses and submit evidence; (c) to present objections, motions, and arguments, oral or written; and (d) to obtain a transcript of the proceedings on request.

§ 5.63 Evidence; transcript; in camera orders; proposed findings of fact and conclusions of law.

Sections 3.43, 3.44, 3.45, and 3.46 of the Commission's Rules of Practice shall govern, respectively, the receipt and objections to admissibility of evidence, the transcript of the hearing, *in camera* orders and the submission and consideration of proposed findings of fact and conclusions of law except that (a) a copy of the hearing transcript shall be provided the respondent; and (b) the Commission has the burden of establishing, by a preponderance of the evidence on the record as a whole, the allegations stated in the order to show cause.

§ 5.64 Initial decision.

Section 3.51 of the Commission's Rules of Practice shall govern the initial decision in proceedings under this subpart, except that the determination of the Administrative Law Judge must be supported by a preponderance of the evidence.

§ 5.65 Review of initial decision.

Appeals from the initial decision of the Administrative Law Judge or review by the Commission in the absence of an appeal shall be governed by §§ 3.52 and 3.53 of the Commission's Rules of Practice except that oral arguments shall be nonpublic subject to the exceptions stated in § 3.52 of this part.

§ 5.66 Commission decision and reconsideration.

The Commission's decision and any reconsideration or reopening of the proceeding shall be governed by §§ 2.51, 3.54, 3.55, 3.71 and 3.72 of the Commission's Rules of Practice, except that (a) if the initial decision is modified or reversed, the Commission shall specify such findings of fact and conclusions of law as are different from those of the presiding official; and (b) references therein to "court of appeals" shall be deemed for purposes of proceedings under this part to refer to "district court."

§ 5.67 Sanctions.

In the case of any respondent who fails to request a hearing after receiving adequate notice of the allegations pursuant to § 5.57 or who is found in the Commission's final decision to have violated 18 U.S.C. 207 (a), (b), or (c), the Commission may order such disciplinary action as it deems warranted, including: (a) Reprimand; (b) suspension from participating in a particular matter or matters before the Commission; or (c) prohibiting the respondent from making, with the intent to influence, any formal or informal appearance before, or any oral or written communication to, the Commission or its staff on any matter or business on behalf of any other person (except the United States) for a period not to exceed five (5) years.

§ 5.68 Judicial review.

A respondent against whom the Commission has issued an order imposing disciplinary action under this Part may seek judicial review of the Commission's determination in an appropriate United States District Court by filing a petition for such review within sixty (60) days of receipt of notice of the Commission's final decision.

PART 13—PROHIBITED TRADE PRACTICES AND AFFIRMATIVE CORRECTIVE ACTIONS

Authority: Sec. 6(g), 5, 38 Stat. 722, 719, sec. 2 (a), (c), (d), (e), 49 Stat. 1526, 1527; 15 U.S.C. 46, 45, 13(a), (c), (d), (e), unless otherwise noted.

Source: 24 FR 10287, Dec. 19, 1959, unless otherwise noted.

Complete listings of all firms and individuals named in cease and desist orders are carried in the Annual Indexes to the Federal Register. For public information services of the Federal Trade Commission, see §§ 4.8, 4.9, and 4.11 of this title.

Part 13 is a codified listing of prohibited trade practices and affirmative corrective actions. There is no accompanying textual explanation. To examine the Commission's interpretations or applications of these practices and/or actions see the documents published in the Federal Register under 16 CFR Part 13.

Subpart—Acquiring Confidential Information Unfairly

§ 13.1 Acquiring confidential information unfairly.

13.1-1 Equal Credit Opportunity Act.
13.1-5 Fair Credit Reporting Act.

Subpart—Acquiring Corporate Stock or Assets

§ 13.5 Acquiring corporate stock or assets.

[29 FR 1797, Feb. 6, 1964]

13.5-20 Federal Trade Commission Act.

[29 FR 4795, Apr. 4, 1964]

§ 13.6 Arrangements, connections, dealings, etc.

[38 FR 10707, May 1, 1973]

§ 13.7 Joint ventures.

[31 FR 11747, Sept. 8, 1966]

Subpart—Advertising Falsely or Misleadingly

§ 13.10 Advertising falsely or misleadingly.

13.10-1 Availability of merchandise and/or services.

[39 FR 36000, Oct. 7, 1974]

13.10-5 Knowingly by advertising agent.

[42 FR 6800, Feb. 4, 1977]

§ 13.15 Business status, advantages, or connections.

13.15-5 Advertising and promotional services.
13.15-10 Authorized distributor.
13.15-15 Bonded business.
13.15-20 Business methods and policies.
13.15-25 Concealed subsidiary, fictitious collection agency, etc.

13.15-30 Connections or arrangements with others.
13.15-35 Contracts and obligations.
13.15-40 Cooperative nature.
13.15-45 Customer connection.
13.15-50 Dealer as charitable institution.
13.15-55 Direct dealing advantages.
13.15-60 Exclusive distributor or producer.
13.15-65 Financial condition.
13.15-70 Financing activities.
13.15-75 Foreign branches, operations, etc.
13.15-80 Government connection.
13.15-85 Government goods.
13.15-90 Government indorsement.
13.15-95 Government registration.
13.15-100 History.
13.15-105 Identity.
13.15-110 Importer or exporter.
13.15-115 Independence of other affiliation.
13.15-120 Individual being corporation.
13.15-125 Individual or private business being:
13.15-125(a) Association.
13.15-125(c) Charitable institution.
13.15-125(e) College.
13.15-125(g) Cooperative.
13.15-125(i) Council.
13.15-125(k) Divinity school.
13.15-125(m) Educational or research institution.
13.15-125(o) Foundation.
13.15-125(p) Guild.
13.15-125(s) Institute.
13.15-125(u) Non-profit organization.
13.15-125(w) Press or news affiliate.
13.15-150 Indorsement.
13.15-155 Institutional connections.
13.15-165 International nature.
13.15-167 Inventor or originator.
13.15-170 Large purchases and stock turnover.
13.15-175 Liquidation.
13.15-180 Location.
13.15-185 Mail order house advantage.
13.15-190 Manufacturing nature.
13.15-195 Nature.
13.15-200 Non-profit character.
13.15-205 Offices in principal cities.
13.15-210 Operations as special or other advertising.
13.15-215 Organization and operation.
13.15-220 Patent or other rights.
13.15-225 Personnel or staff.
13.15-230 Plant and equipment.
13.15-235 Producer status of dealer or seller.
13.15-235(c) Chemist.
13.15-235(e) Furrier.
13.15-235(g) Grower, nursery, etc.
13.15-235(k) Laboratory.
13.15-235(m) Manufacturer.
13.15-235(p) Publisher, printer, etc.
13.15-235(s) Refiner.

[25 FR 9203, Sept. 27, 1960]

13.15-235(u) Tanner.

[27 FR 8485, Aug. 24, 1962]

13.15-237 Professional or scientific status.
13.15-240 Properties and rights.
13.15-245 Prospects.
13.15-247 Publication services.
13.15-250 Qualifications and abilities.
13.15-255 Reputation, success, or standing.
13.15-260 Retailer as wholesaler, jobber, factory distributor.
13.15-265 Service.
13.15-270 Size and extent.
13.15-275 Stock, product or service.
13.15-278 Time in business.
13.15-280 Unique or special status or advantages.

§ 13.20 Comparative data or merits.

13.20-20 Competitors' products.

§ 13.25 Competitors and their products.

13.25-5 Competitors.
13.25-10 Competitors' catalogs.
13.25-15 Competitors' prices.
13.25-20 Competitors' product.
13.25-25 Competitors' services.

§ 13.30 Composition of goods.

13.30-30 Fur Products Labeling Act.
13.30-60 Oleomargarine Amendment to FTC Act.
13.30-75 Textile Fiber Products Identification Act.
13.30-100 Wool Products Labeling Act.

§ 13.35 Condition of goods.

§ 13.40 Conditions of manufacture.

13.40-10 In general.
13.40-20 Law compliance.
13.40-50 Union shop.

§ 13.42 Connection of others with goods.

§ 13.45 Content.

§ 13.50 Dealer or seller assistance.

§ 13.55 Demand, business or other opportunities.

§ 13.60 Earnings and profits.

§ 13.65 Fictitious affidavits.

§ 13.70 Fictitious or misleading guarantees.

§ 13.71 Financing.

§ 13.73 Formal regulatory and statutory requirements.

13.73-10 Fur Products Labeling Act.
13.73-70 Wool Products Labeling Act.

13.73-90 Textile Fiber Products Identification Act.
13.73-92 Truth in Lending Act.

[35 FR 14199, Sept. 9, 1970]

§ 13.75 Free goods or services.

§ 13.80 Free test or trial.

§ 13.85 Government approval, action, connection or standards.

13.85-5 Accreditation of correspondence courses, etc.
13.85-15 Civil Service Commission connections or recognition.
13.85-20 Commercialization, unsanctioned, or the military or naval.
13.85-25 Federal Communications Commission orders.
13.85-27 Federal Housing Administration.

[29 FR 12824, Sept. 11, 1964]

13.85-30 Federal Trade Commission orders or indorsement.
13.85-33 Food and Drug Administration.
13.85-35 Government indorsement.
13.85-35(a) Foreign.

[38 FR 4944, Feb. 23, 1973]

13.85-40 In general.
13.85-45 Inspection.
13.85-50 National Bureau of Standards.
13.85-55 Small Business Administration.
13.85-60 Standards, specifications, or source.
13.85-65 States.
13.85-70 Tests and investigations.
13.85-75 Use.

§ 13.90 History of product or offering.

§ 13.95 Identity of product.

13.95-20 Fur Products Labeling Act.

§ 13.100 Individual attention.

§ 13.105 Individual's special selection or situation.

§ 13.110 Indorsements, approval and testimonials.

§ 13.115 Jobs and employment service.

13.115-20 Government.

§ 13.120 Legality or legitimacy.

§ 13.125 Limited offers or supply.

§ 13.130 Manufacture or preparation.

13.130-20 Fur Products Labeling Act.
13.130-50 Textile Fiber Products Identification Act.
13.130-80 Wool Products Labeling Act.

§ 13.135 Nature of product or service.

13.135-50 Oleomargarine amendment to FTC Act.

§ 13.140 Old, reclaimed or reused product being new.

§ 13.142 Operation.

[29 FR 2490, Feb. 15, 1964]

§ 13.143 Opportunities.

§ 13.145 Patent or other rights.

§ 13.150 Premiums and prizes.

13.150-30 Premiums.
13.150-35 Prizes.

§ 13.155 Prices.

13.155-5 Additional charges unmentioned.
13.155-10 Bait.
13.155-15 Comparative.
13.155-20 Cost, expense reimbursing, or advertising.
13.155-25 Coupon, certificate, check, credit vouchers, etc., values.
13.155-30 Credit price same as cash.
13.155-33 Demonstration reductions.

[27 FR 2175, Mar. 7, 1962]

13.155-35 Discount savings.
13.155-40 Exaggerated as regular and customary.
13.155-45 Fictitious marking.
13.155-50 Forced or sacrifice sales.
13.155-55 Government requirements.
13.155-60 List or catalog as regular selling.
13.155-65 Offered by buyer.
13.155-70 Percentage savings.
13.155-75 Product or quantity covered.
13.155-78 Repossession balances.

[29 FR 11448, Aug. 8, 1964]

13.155-80 Retail as cost, wholesale, discounted, etc.

[31 FR 3232, Mar. 1, 1966]

13.155-85 Sales below cost.
13.155-90 Savings and discounts subsidized.
13.155-93 Special or test offers.

[29 FR 3618, Mar. 21, 1964]

13.155-95 Terms and conditions.
13.155-95(a) Truth in Lending Act.

[35 FR 14199, Sept. 9, 1970]

13.155-98 Two-for-one sales.

[27 FR 9987, Oct. 10, 1962]

13.155-100 Usual as reduced, special etc.

§ 13.157 Price contests.

§ 13.160 Promotional sales plans.

§ 13.170 Qualities or properties of product or service.

13.170-1 Adherent.

[29 FR 6622, May 21, 1964]

13.170-2 Air conditioning.
13.170-4 Alkalizing.
13.170-6 Analgesic.
13.170-8 Anti-freeze.
13.170-10 Antiseptic, germicidal.
13.170-12 Auxiliary, improving, or supplementary.
13.170-13 Biodegradable.

[38 FR 4944, Feb. 23, 1973]

13.170-14 Bleaching.
13.170-16 Cleansing, purifying.
13.170-18 Contraceptive.
13.170-20 Cooling, refrigerating.
13.170-22 Corrective, orthopedic, etc.
13.170-24 Cosmetic or beautifying.
13.170-26 Deodorant.
13.170-28 Depilatory.
13.170-30 Durability or permanence.
13.170-32 Dustproof.
13.170-34 Economizing or saving.
13.170-35 Educational, informative, training.
13.170-37 Embalming.
13.170-38 Fade-proof or colorfast.
13.170-40 Fire-extinguishing or fire-resistant.
13.170-42 Frostproof.
13.170-43 Heating.

[27 FR 1115, Feb. 7, 1962]

13.170-44 Illuminating.
13.170-46 Insecticidal or repellent.
13.170-48 Insulating.
13.170-50 Leakproof or leakproofing.
13.170-52 Medicinal, therapeutic, healthful, etc.
13.170-53 Medicinal, etc.—animal.
13.170-54 Moth-proof or moth-proofing.
13.170-56 Non-corroding.
13.170-58 Non-irritating.
13.170-60 Non-magnetic.
13.170-62 Non-tarnishing.
13.170-63 Nontoxic.

[40 FR 13482, Mar. 27, 1975]

13.170-64 Nutritive.
13.170-66 Odorless.
13.170-68 Preserving.
13.170-70 Preventive or protective.
13.170-72 Productive.
13.170-74 Reducing non-fattening, low-calorie, etc.
13.170-76 Rejuvenating.
13.170-78 Renewing, restoring.
13.170-80 Rodenticidal.
13.170-82 Sanitary.
13.170-84 Shock-resistant.
13.170-86 Sterility.
13.170-88 Tensile strength.
13.170-90 Termite-repellent.
13.170-92 Ventilating.
13.170-94 Vermifugal.
13.170-96 Waterproof, waterproofing, water-repellent.
13.170-98 Wrinkle-proof or wrinkle-resistant.

§ 13.175 Quality of product or service.

§ 13.180 Quantity.

13.180-30 In stock.
13.180-35 Offered.

§ 13.185 Refunds, repairs, and replacements.

§ 13.190 Results.

§ 13.192 Retraction advertisement.

[36 FR 5778, Mar. 27, 1971]

§ 13.195 Safety.

13.195-30 Investment.
13.195-60 Product.

§ 13.200 Sample, offer or order conformance.

§ 13.205 Scientific or other relevant facts.

§ 13.210 Scientific tests.

§ 13.215 Seals, emblems, or awards.

§ 13.220 Securities.

§ 13.225 Services.

§ 13.230 Size or weight.

§ 13.235 Source or origin.

13.235-20 Doctor's design, supervision, manufacture, etc.
13.235-25 Fashion designers.

[29 FR 401, Jan. 16, 1964]

13.235-30 Government.
13.235-35 History.
13.235-40 In general.
13.235-50 Maker or seller, etc.
13.235-50(a) Fur Products Labeling Act.
13.235-50(b) Textile Fiber Products Identification Act.
13.235-50(c) Wool Products Labeling Act.
13.235-50(g) In general.

[29 FR 8478, July 7, 1964]

13.235-60 Place.
13.235-60(a) Domestic products as imported.

13.235-60(c) Foreign, in general.
13.235-60(e) Imported products or parts as domestic.
13.235-60(g) In general.

§ 13.240 Special or limited offers.

§ 13.245 Specifications or standards conformance.

§ 13.247 Statutes and regulations.

§ 13.250 Success, use or standing.

§ 13.255 Surveys.

§ 13.260 Terms and conditions.

13.260-40 Insurance coverage.

§ 13.265 Tests and investigations.

§ 13.270 Trade-mark registration or use.

§ 13.271 Trade secrets.

§ 13.272 Type or variety.

§ 13.275 Undertakings, in general.

§ 13.280 Unique nature or advantages.

§ 13.285 Value.

Subpart—Aiding, Assisting and Abetting Unfair or Unlawful Act or Practice

§ 13.290 Aiding, assisting and abetting unfair or unlawful act or practice.

Subpart—Appropriating Trade Name or Mark Wrongfully

§ 13.295 Appropriating trade name or mark wrongfully.

13.295-20 Competitor.
13.295-60 Predecessor.
13.295-65 Product.

Subpart—Appropriating Values of Competitor

§ 13.300 Appropriating values of competitor.

Subpart—Boycotting Seller-Suppliers

§ 13.302 Boycotting seller-suppliers.

Subpart—Bribing Customers' Employees

§ 13.315 Employees of private concerns.

§ 13.320 Government officials or employees.

Subpart—Claiming or Using Indorsements or Testimonials Falsely or Misleadingly

§ 13.330 Claiming or using indorsements or testimonials falsely or misleadingly.

13.330-1 "AAA".
13.330-3 American Federation of Labor.
13.330-6 American Medical Association.
13.330-9 Better Business Bureau.
13.330-12 Boy Scouts of America.
13.330-15 British Royal Family.
13.330-18 Canadian authorities.
13.330-21 Chamber of Commerce.
13.330-24 Civilian defense organizations.
13.330-27 Consumers Research.
13.330-30 Dentists.
13.330-33 Doctors and medical profession.
13.330-36 Druggists of America.
13.330-39 Educators, school authorities, etc.
13.330-42 Fire wardens.
13.330-43 Foreign government, person, organization and/or institution.

[38 FR 4944, Feb. 23, 1973]

13.330-45 Health authorities, hospitals, nursing profession, etc.
13.330-48 Hotels, motels, etc.
13.330-51 International Labor News Service.
13.330-54 Labor unions.
13.330-57 Manufacturers, well-known.
13.330-60 National organizations.
13.330-63 Newspapers.
13.330-64 Olympic or other sporting events.

[38 FR 30869, Nov. 8, 1973]

13.330-66 Police.
13.330-69 Prominent persons.
13.330-72 Publishers.
13.330-75 Radio and television industries.

13.330-77 Railroads.
13.330-80 Red Cross.
13.330-83 Smokers.
13.330-85 State agencies.
13.330-88 Underwriters Laboratories.
13.330-90 United States Government:
13.330-90(a) Armed Services.
13.330-90(b) Bureau of Indian Affairs.
13.330-90(c) Bureau of Standards.
13.330-90(d) Civil Service Commission.
13.330-90(e) Department of Agriculture.
13.330-90(f) Department of Commerce.
13.330-90(g) Federal Communications Commission.
13.330-90(h) Federal Trade Commission.
13.330-90(i) Fish and Wildlife Service.
13.330-90(j) Interstate Commerce Commission.
13.330-90(k) Public Health Service.
13.330-90(l) Veterans Administration.
13-330-91 Universities.
13.330-94 Users in general.
13.330-97 Welfare, patriotic, or charitable organizations.

Subpart—Coercing and Intimidating

§ 13.345 Competitors.

§ 13.350 Customers or prospective customers.

§ 13.355 Customers or prospective customers of competitors.

§ 13.356 Delinquent debtors.

[40 FR 13480, Mar. 27, 1975]

§ 13.358 Distributors.

[25 FR 11208, Nov. 26, 1960]

§ 13.360 Distributors of competitors.

§ 13.365 Employees of competitors.

§ 13.367 Members.

[44 FR 19384, Apr. 3, 1979]

§ 13.370 Suppliers and sellers.

§ 13.375 Suppliers of competitors.

§ 13.380 Publishers of advertising mediums of competitors.

Subpart—Collecting, Assembling, Furnishing or Utilizing Consumer Reports

§ 13.382 Collecting, assembling, furnishing or utilizing consumer reports.

[37 FR 22730, Oct. 21, 1972]

13.382-1 Confidentiality, accuracy, relevancy and proper utilization.

[38 FR 22730, Oct. 21, 1973]

13.382-1(a) Fair Credit Reporting Act.

[38 FR 22730, Oct. 21, 1973]

13.382-1(b) Equal Credit Opportunity Act.

13.382-5 Formal regulatory and/or statutory requirements.

[38 FR 22730, Oct. 21, 1973]

13.382-5(a) Fair Credit Reporting Act.

[38 FR 22730, Oct. 21, 1973]
13.382-5(b) Equal Credit Opportunity Act.

Subpart—Combining or Conspiring

§ 13.384 Combining or comspiring.

[44 FR 23820, Apr. 23, 1979]

§ 13.385 To boycott seller-suppliers.

§ 13.388 To control allocation and solicitation of customers.

[29 FR 4795, Apr. 4, 1964]

§ 13.390 To control employment practice.

§ 13.395 To control marketing practices and conditions.

§ 13.397 To cut off competitor's supplies.

§ 13.400 To discriminate or stabilize prices through basing point or delivered price systems.

§ 13.405 To discriminate unfairly or restrictively in general.

§ 13.407 To disparage competitors or their products.

§ 13.410 To eliminate competition in conspirators' goods.

§ 13.425 To enforce or bring about resale price maintenance.

§ 13.430 To enhance, maintain or unify prices.

§ 13.431 To exchange future price information.

[29 FR 3191, Mar. 10, 1964]

§ 13.432 To fix and maintain uniform freight charges.

§ 13.433 To fix prices.

§ 13.435 To fix prices through patent license agreements.

§ 13.440 To force credit allowance adjustment or trade policy.

§ 13.445 To force guarantee against price decline.

§ 13.450 To limit distribution or dealing to regular, established or acceptable channels or classes.

§ 13.452 To limit production.

§ 13.455 To maintain monopoly.

§ 13.460 To nullify Government rate advantages.

§ 13.470 To restrain and monopolize trade.

§ 13.472 To restrain cooperatives' activities.

§ 13.475 To restrict competition in buying.

§ 13.490 To sell products deceptively.

§ 13.493 To submit collusive bids.

[27 FR 5884, June 26, 1962]

§ 13.495 To submit sham or fictitious bids or price quotations.

§ 13.497 To terminate or threaten to terminate contracts, dealings, franchises, etc.

[38 FR 29317, Oct. 24, 1973]

Subpart—Commercializing Improperly, Confidential or Restricted Governmental Matter

§ 13.500 Commercializing improperly, confidential or restricted governmental matter.

Subpart—Concealing, Obliterating or Removing Law Required and Informative Marking

§ 13.510 Foreign source.

§ 13.512 Fur products tags or identification.

§ 13.515 Government or war surplus.

§ 13.520 Quality, grade or qualities.

§ 13.523 Textile fiber products tags or identification.

[27 FR 5863, June 21, 1962]

§ 13.525 Wool products tags or identification.

Subpart—Contracting for Sale in Any Form Binding on Buyer Prior to End of Specified Time Period

§ 13.527 Contracting for sale in any form binding on buyer prior to end of specified time period.

[39 FR 17098, May 13, 1974]

Subpart—Controlling, Unfairly, Seller-Suppliers

§ 13.530 Controlling, unfairly, seller-suppliers.

Subpart—Corrective Actions and/or Requirements

§ 13.533 Corrective actions and/or requirements.

13.533-5 Arbitration.
13.533-10 Corrective advertising.
13.533-15 Destruction of records and/or data.
13.533-20 Disclosures.
13.533-25 Displays, in-house.
13.533-28 Educational programs.
13.533-30 Election of officers.
13.533-35 Employment of independent agencies.
13.533-37 Formal regulatory and/or statutory requirements.

13.533-37(a) Hobby Protection Act.

[40 FR 14301, Mar. 31, 1975]

13.533-40 Furnishing information to media.
13.533-43 Grant license(s).
13.533-45 Maintain records.
13.533-45(a) Advertising substantiation.
13.533-45(c) Complaints.
13.533-45(e) Correspondence.
13.533-45(k) Records, in general.
13.533-45(m) Records, sales.
13.533-50 Maintain means of communication.
13.533-51 Making supply of products available to competitors.
13.533-53 Recall of merchandise, advertising material, etc.

[40 FR 14301, Mar. 31, 1975]

13.533-55 Refunds, rebates, and/or credits.
13.533-56 Removal of directors or representatives from board of directors.
13.533-57 Restitution.
13.533-60 Release of general, specific, or contractual constrictions, requirements, or restraints.
13.533-65 Renegotiation and/or amendment of contracts.
13.533-66 Research programs.

[40 FR 12255, Mar. 18, 1975]

13.533-70 Vacate court actions.

[40 FR 12258, Mar. 18, 1975]

13.533-75 Warranties.

[41 FR 6720, Feb. 13, 1976]

Subpart—Cutting Off Access to Customers or Market

§ 13.535 Contracts restricting customers' handling of competing products.

§ 13.537 Contracts restricting employees' rights to work for self or competitor.

[25 FR 5221, June 11, 1960]

§ 13.540 Forcing goods.

§ 13.543 Franchises.

[44 FR 54470, Sept. 20, 1979]

§ 13.545 Government specifications.

§ 13.550 Hindering salesmen.

§ 13.555 Instigating vexatious and groundless taxpayers' suits.

§ 13.560 Interfering with distributive outlets.

§ 13.565 Interfering with advertising mediums.

§ 13.570 Interfering with competitors' bids or price quotations.

§ 13.572 Leasing trucking equipment of distributors.

[27 FR 10097, Oct. 13, 1962]

§ 13.573 Limiting new warehouse facilities.

§ 13.575 Localized price cutting below other comparable areas.

§ 13.580 Organizing and controlling seller suppliers.

§ 13.585 Removing or substituting products.

§ 13.587 Selling competitive product at reduced or below cost price.

§ 13.590 Threatening and boycotting competitors.

§ 13.595 Threatening withdrawal of patronage from competitors' customers.

§ 13.600 Withholding patronage from recalcitrant suppliers.

§ 13.605 Withholding supplies or goods from competitors' customers.

Subpart—Cutting Off Supplies or Service

§ 13.610 Cutting off supplies or service.

§ 13.613 Advertising contracts.

§ 13.615 Exclusive contracts with suppliers.

§ 13.617 Inducing suppliers to refuse to sell to competitors.

[29 FR 2597, Feb. 20, 1964; 29 FR 2755, Feb. 27, 1964]

§ 13.620 Misrepresenting competitive supply sources.

§ 13.625 Organizing and controlling supply sources.

§ 13.630 Paying and quoting unwarranted prices.

§ 13.635 Refusing sales to, or same terms and conditions.

§ 13.645 Suppressing competition in second-hand products.

§ 13.655 Threatening disciplinary action or otherwise.

§ 13.660 Threatening withdrawal of patronage.

Subpart—Cutting Prices Arbitrarily

§ 13.665 Cutting prices arbitrarily, to stifle competition.

13.665-90 Under Clayton Act, sec. 2(a).

Subpart—Dealing on Exclusive and Tying Basis

§ 13.670 Dealing on exclusive and tying basis.

13.670-10 Clayton Act, sec. 3.
13.670-20 Federal Trade Commission Act.

Subpart—Delaying or Withholding Corrections, Adjustments or Action Owed

§ 13.675 Delaying or withholding corrections, adjustments or action owed.

§ 13.677 Delaying or failing to deliver goods.

[33 FR 12837, Sept. 11, 1968]

Subpart—Delivering Short Measure

§ 13.680 Delivering short measure.

Subpart—Discriminating Between Customers

§ 13.685 Discriminating between customers.

13.685-5 Clayton Act.
13.685-10 Federal Trade Commission Act.

Subpart—Discriminating in Credit Transactions on Basis of Marital Status and/or Sex

§ 13.687 Discriminating in credit transactions on basis of marital status and/or sex.

13.687-5 Formal regulatory and/or statutory requirements.
13.687-5(a) Equal Credit Opportunity Act.

[40 FR 57668, Dec. 11, 1975]

Subpart—Discriminating in Price Under Sec. 2, Clayton Act

PRICE DISCRIMINATION UNDER 2(a)

§ 13.690 Additional deliveries not charged for.

§ 13.695 Annual purchases from all sources.

§ 13.700 Arbitrary or improper functional discounts.

§ 13.705 Basing point delivered prices.

§ 13.710 Cash discounts.

§ 13.715 Charges and price differentials.

§ 13.720 Container differentials.

§ 13.725 Cumulative quantity discounts and schedules.

§ 13.730 Customer classification.

§ 13.733 Cylinder or container rental.

§ 13.735 Delivered price systems.

§ 13.736 Group buying organizations.

§ 13.737 Localized price cutting.

§ 13.738 Markdown allowances.

[29 FR 1456, Jan. 29, 1964]

§ 13.740 Off-schedule selling.

§ 13.745 Order booking system.

§ 13.750 Place differentials.

§ 13.755 Pooling orders of chain stores and buying groups.

§ 13.760 Quantity customer requirement base.

§ 13.770 Quantity rebates or discounts.

§ 13.780 Royalties for advertising insignia.

§ 13.785 Terms and conditions.

§ 13.790 Trade areas.

§ 13.792 User discounts on retail sales.

§ 13.795 Warehouse rental and service.

Payment or Acceptance of Commission, Brokerage or Other Compensation Under 2(c)

§ 13.800 Buyers' agents.

§ 13.805 Buyers' associations.

§ 13.810 Buyers' corporate or other agent.

§ 13.815 Commission resident buyers.

§ 13.817 Decreased brokerage.

§ 13.820 Direct buyers.

§ 13.821 Freight rebates.

§ 13.822 Lowered price to buyers.

Payment for Services or Facilities for Processing or Sale Under 2(d)

§ 13.824 Advertising expenses.

§ 13.825 Allowances for services or facilities.

Furnishing Services or Facilities for Processing, Handling, Etc. Under 2(e)

§ 13.830 Furnishing services or facilities.

§ 13.835 Demonstrators.

§ 13.840 Different size containers.

§ 13.841 Free samples.

[27 FR 9942, Oct. 10, 1962]

§ 13.842 Missionary personnel.

[26 FR 3102, Apr. 12, 1961]

§ 13.843 Promotional enterprises.

§ 13.844 Return of merchandise.

[29 FR 1456, Jan. 29, 1964]

§ 13.845 Share of advertising expenses.

§ 13.846 Return of unsold items.

[31 FR 6297, Apr. 26, 1966]

Knowingly Inducing or Receiving Discriminating Price Under 2(f)

§ 13.850 Advertising credits exceeding value.

§ 13.855 Inducing and receiving discriminations.

Subpart—Discriminating in Price Under Section 5, Federal Trade Commission Act

§ 13.865 Basing point price systems.

§ 13.870 Charges and prices.

§ 13.875 Combination.

§ 13.880 Delivered price systems.

§ 13.885 Functional classification.

§ 13.890 Geographical zone price systems.

§ 13.892 Knowingly inducing or receiving discriminating payments.

§ 13.893 Lease versus sale.

[29 FR 7819, June 19, 1964]

§ 13.894 Unequal discounts.

Subpart—Disparaging Competitors and Their Products

COMPETITORS

§ 13.895 Business facilities, service, size or scope.

§ 13.900 Commission proceedings.

§ 13.905 Discontinuance of operations.

§ 13.915 Employees as respondent's.

§ 13.917 Facilities.

§ 13.920 Identity.

§ 13.925 Infringement litigation.

§ 13.930 Methods; in general.

§ 13.935 Methods; members of a "trust".

§ 13.940 Personnel.

§ 13.945 Prices.

§ 13.950 Reliability, history and financial condition.

§ 13.953 Reputation or standing.

COMPETITORS' PRODUCTS

§ 13.960 Competitor's as same as own.

§ 13.965 Composition.

§ 13.970 Discontinuance.

§ 13.975 History.

§ 13.980 Law compliance.

§ 13.985 Manufacture or preparation.

§ 13.990 Materials.

§ 13.995 Nature.

§ 13.1000 Performance.

§ 13.1005 Prices.

§ 13.1010 Qualities or properties.

§ 13.1015 Quality.

§ 13.1020 Results.

§ 13.1025 Safety.

§ 13.1030 Source or origin.

§ 13.1033 Success, use, or standing.

§ 13.1035 Tests.

§ 13.1040 Value.

Subpart—Disparaging Products, Merchandise, Services, etc.

§ 13.1042 Disparaging products, merchandise, services, etc.

[39 FR 37768, Oct. 24, 1974]

Subpart—Disseminating Advertisements, etc.

§ 13.1043 Disseminating Advertisements, etc.

[42 FR 12041, Mar. 2, 1977]

Subpart—Enforcing Dealings or Payments Wrongfully

§ 13.1045 Enforcing dealings or payments wrongfully.

Subpart—Failing To Comply with Affirmative Statutory Requirements

§ 13.1048 Failing to comply with affirmative statutory requirements.

13.1048-10 Fair Credit Reporting Act.
13.1048-35 Magnuson—Moss Warranty Act.
13.1048-45 Truth in Lending Act.

Subpart—Enticing Away Competitors' Employees

§ 13.1050 Enticing away competitors' employees.

Subpart—Failing To Maintain Records

§ 13.1051 Failing to maintain records.

13.1051-10 Accurate.

[38 FR 25434, Sept. 13, 1973]

13.1051-20 Adequate.

[38 FR 10712, May 1, 1973]

13.1051-30 Formal Regulatory and/or statutory requirements.

[39 FR 34316, Dec. 13, 1973]

Subpart—Failing To Provide Foreign Language Translations

§ 13.1052 Failing to provide foreign language translations.

[41 FR 14501, Apr. 6, 1976]

Subpart—Furnishing False Guaranties

§ 13.1053 Furnishing false guaranties.

13.1053-35 Fur Products Labeling Act.
13.1053-80 Textile Fiber Products Identification Act.
13.1053-90 Wool Products Labeling Act.

Subpart—Furnishing Means and Instrumentalities of Misrepresentation or Deception

§ 13.1055 Furnishing means and instrumentalities of misrepresentation or deception.

13.1055-50 Preticketing merchandise misleadingly.

§ 13.1057 Packaging deceptively.

[32 FR 10565, July 19, 1967]

13.1057-40 Oversized containers.

[32 FR 10565, July 19, 1967]

Subpart—Importing, Manufacturing, Selling or Transporting Merchandise

§ 13.1060 Importing, manufacturing, selling or transporting merchandise.

[42 FR 48334, Sept. 23, 1977]

§ 13.1061 Formal regulatory and/or statutory requirements.

13.1061-10 Hobby Protection Act.

[40 FR 14301, Mar. 31, 1975]

Subpart—Inducing Breach of Competitors' Contracts

§ 13.1065 Customers.

§ 13.1070 Employees.

§ 13.1075 Landlords.

Subpart—Interfering With Competitors or Their Goods

§ 13.1080 Interfering with competitors or their goods.

COMPETITORS

§ 13.1085 Harassing.

§ 13.1087 Instigating vexatious and groundless suits.

§ 13.1090 Requests for estimates not in good faith.

§ 13.1092 Sabotaging development of improvements.

[29 FR 12314, Nov. 21, 1963]

GOODS

§ 13.1095 Anticipating previously arranged offers.

§ 13.1097 Concealing or removing competitors' names.

§ 13.1098 Demanding trade secrets.

§ 13.1100 Misadjusting and tampering with.

§ 13.1105 Removing or substituting product.

§ 13.1105-10 Buying up retail stock of competitors' goods.

Subpart—Interlocking Directorates Unlawfully

§ 13.1106 Interlocking directorates unlawfully.

Subpart—Invoicing Products Falsely

§ 13.1108 Invoicing products falsely.

13.1108-40 Federal Trade Commission Act.
13.1108-45 Fur Products Labeling Act.
13.1108-80 Textile Fiber Products Identification Act.
13.1108-90 Wool Products Labeling Act.

Subpart—Maintaining Resale Prices

§ 13.1115 Black listing.

§ 13.1125 Combination.

§ 13.1130 Contracts and agreements.

13.1130-50 Miller-Tydings Amendment.

§ 13.1140 Cutting off supplies.

§ 13.1145 Discrimination.

13.1145-5 Against price cutters.
13.1145-20 Distributive channels and outlets generally.
13.1145-45 In favor of price maintainers.

§ 13.1147 Governmental purchasing.

§ 13.1150 Penalties.

§ 13.1155 Price schedules and announcements.

§ 13.1160 Refusal to sell.

§ 13.1165 Systems of espionage.

13.1165-50 Identifying marks.
13.1165-80 Requiring information of price cutting.
13.1165-90 Spying on and reporting price cutters, in general.

§ 13.1167 Trade-in restrictions.

Subpart—Marking Improperly, Imitation Political and/or Numismatic Items

§ 13.1168 Formal regulatory and/or statutory requirements.

§ 13.1168-5 Hobby Protection Act.

[42 FR 60910, Nov. 30, 1977]

Subpart—Misbranding or Mislabeling

§ 13.1170 Advertising and promotion.

§ 13.1175 Comparative data or merits.

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[26 FR 5676, June 24, 1961]

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[27 FR 2175, Mar. 7, 1962]

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[40 FR 57668, Dec. 11, 1975]

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[40 FR 14301, Mar. 31, 1975]

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[44 FR 56323, Oct. 1, 1979]

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[35 FR 14199, Sept. 9, 1970]

[27 FR 443, Jan. 16, 1962]

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[39 FR 38641, Nov. 1, 1974]

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[35 FR 11295, July 15, 1970]

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[34 FR 15348, Oct. 2, 1969]

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[34 FR 18452, Nov. 20, 1969]

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[27 FR 5604, June 13, 1962]

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[28 FR 11452, Oct. 25, 1963]

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13.2280-70 Textile Fiber Products Identification Act.

[27 FR 443, Jan. 16, 1962]

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[29 FR 1458, Jan. 29, 1964]

§ 13.2400 Individual or private business being press or news service organization.

§ 13.2405 Individual or private business being professional person or association.

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PART 14—ADMINISTRATIVE INTERPRETATIONS, GENERAL POLICY STATEMENTS, AND ENFORCEMENT POLICY STATEMENTS

Sec.
14.2 Use of word "tile" in designation of non-ceramic products.
14.4 Identification of metallically weighted silk fiber.

Sec.
14.7 Rule —— Push Money.
14.9 Requirements concerning clear and conspicuous disclosures in foreign language advertising and sales materials.
14.11 Assigning model years to motor vehicles.
14.12 Use of secret coding in marketing research.
14.15 In regard to comparative advertising.
14.16 Interpretation of Truth-in-Lending Orders consistent with the Truth-in-Lending Simplification and Reform Act and Revised Regulation Z.
14.17 Franchise rule enforcement protocol.

§ 14.2 Use of word "tile" in designation of non-ceramic products.

It is not the policy of the Commission to consider false and misleading the use of the word "tile" in the designation of non-ceramic products provided that either the true composition of said products or the fact that they are not ceramic products is plainly disclosed.

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46)

[15 FR 7357, Nov. 12, 1950]

§ 14.4 Identification of metallically weighted silk fiber.

(a) The following requirements for disclosure of metallic weighting are based on, and interpretive of, section 5(a) of the Federal Trade Commission Act, as amended, and are to be construed as supplementing the fiber identification requirements of the Textile Fiber Products Identification Act and the rules and regulations issued thereunder.

(b) In the case of yarn and fabric containing metallically weighted silk fiber, the fiber identification required by the Textile Fiber Products Identification Act (72 Stat. 1717; 15 U.S.C. 70), and the rules and regulations issued thereunder, shall be immediately accompanied by a clear and non-deceptive disclosure of the fact that the silk fiber present is weighted, with specification of the percentage of the total weight of the silk fiber content in its finished state which the weighting represents:

Provided, however, That specification of the percentage shall be subject to a tolerance not exceeding 3 percent when the deviation is not intentional and reasonable effort has been made to determine and accurately state the precise percentage; and, *Provided further,* That in lieu of a statement of the precise percentage, a maximum percentage may be stated when the precise percentage does not exceed such maximum.

(c) The disclosure of such weighting, in accordance with the above requirements, shall be on the same label on which appears the fiber identification required by the Textile Fiber Products Identification Act and the rules and regulations issued thereunder, and shall appear in immediate conjunction with any representation in advertisements, sales promotional literature, or invoices, which relate to fiber content. The following are examples of disclosure of metallic weighting which will be considered as meeting the requirements of this Administrative Interpretation:

When the fiber content is wholly silk, and the weighting constitutes 50 percent of the weight of the fiber content in its finished state:

> "Fiber content 100 percent silk, weighted 50 percent"; or
>
> "Fiber content all silk, weighted 50 percent."

When the fiber content is of a mixture of 50 percent silk and 50 percent rayon, and the weighting constitutes not more than 25 percent of the silk fiber in its finished state:

> "Fiber content 50 percent silk (weighted not to exceed 25 percent), and 50 percent rayon."

(Sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45)

[25 FR 2835, Apr. 5, 1960]

§ 14.7 Rule —— Push Money.

It is an unfair trade practice for any industry member to pay or contract to pay anything of value to a sales person employed by a customer of the industry member, as compensation for, or as an inducement to obtain, special or greater effort or service on the part of the sales person in promoting the resale of products supplied by the industry member to the customer:

(a) When the agreement or understanding under which the payment or payments are made or are to be made is without the knowledge and consent of the sales person's employer; or

(b) When the terms and conditions of the agreement or understanding are such that any benefit to the sales person or customer is dependent on lottery; or

(c) When any provision of the agreement or understanding requires or contemplates practices or a course of conduct unduly and intentionally hampering sales of products of competitors of an industry member; or

(d) When, because of the terms and conditions of the understanding or agreement, including its duration, or the attendant circumstances, the effect may be to substantially lessen competition or tend to create a monopoly; or

(e) When similar payments are not accorded to sales persons of competing customers on proportionally equal terms in compliance with section 2 (d) and (e) of the Clayton Act.

NOTE: Payments made by an industry member to a sales person of a customer under any agreement or understanding that all or any part of such payments is to be transferred by the sales person to the customer, or is to result in a corresponding decrease in the sales person's salary, are not to be considered within the purview of the Rule——, but are to be considered as subject to the requirements and provisions of section 2(a) of the Clayton Act.

(Secs. 5, 6; 38 Stat. 719, as amended, 721; 15 U.S.C. 45, 46)

[27 FR 4331, May 5, 1962]

§ 14.9 Requirements concerning clear and conspicuous disclosures in foreign language advertising and sales materials.

The Federal Trade Commission has noted that, with increasing intensity, advertisers are making special efforts to reach foreign language-speaking consumers. As part of this special effort, advertisements, brochures and sales documents are being printed in foreign languages. In recent years the Commission has issued various cease-and-desist orders as well as rules, guides and other statements, which require affirmative disclosures in connection with certain kinds of representations and business activities. Generally, these disclosures are required to be "clear and conspicuous." Because questions have arisen as to the meaning and application of the phrase "clear and conspicuous" with respect to foreign language advertisements and sales materials, the Commission deems it appropriate to set forth the following enforcement policy statement:

(a) Where cease-and-desist orders as well as rules, guides and other statements require "clear and conspicuous" disclosure of certain information, that disclosure must be in the same language as that principally used in the advertisements and sales materials involved.

(b) Any respondent who fails to comply with this requirement may be the subject of a civil penalty proceeding for violating the terms of a Commission cease-and-desist order.

(Sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45)

[38 FR 21494, Aug. 9, 1973]

§ 14.11 Assigning model years to motor vehicles.

(a) The Federal Trade Commission has been concerned about misleading practices some manufacturers have used to identify the model years of heavy duty trucks and other vehicles whose features change little from year to year.

(b) Two practices have been of particular concern:

(1) Some manufacturers have changed the identification papers of unsold vehicles at the end of one model year to show that the vehicles are of the next model year;

(2) Some manufacturers have let their branches or dealers base the model year on the date of sale to retail purchasers.

(c) These practices may mislead buyers as to the date of manufacture. They may also hinder market forces that normally lead to price cuts at the end of model years.

GUIDELINES

(d) To prevent deception and help manufacturers avoid violating the Federal Trade Commission Act, the Commission has issued the following guidelines for motor vehicle manufacturers and dealers. They apply to all motor vehicles built for use upon public highways. These include truck chassis and incomplete vehicles used in building motor homes. The guidelines are:

(1) Manufacturers of motor vehicles must put on each vehicle a permanent label. The label must show clearly and conspicuously the month and year of manufacture. Following the certification rules of the National Highway Traffic Safety Administration, 49 CFR Part 567 (1977), will satisfy this requirement;

(2) Manufacturers must assign model years to all vehicles shipped to states which provide spaces on title or registration papers for model years, or which otherwise identify vehicles by model years on such papers. Manufacturers must indicate the model years on the Certificates or Statements of Origin of all vehicles shipped to such states. (As of July, 1978, all states except Hawaii either provided spaces on title or registration papers for model years, or otherwise identify vehicles by model years on such papers;

(3) In assigning model years, manufacturers must follow written standards set for each model before a model year starts;

(4) The standards must be uniformly applied to all vehicles of a particular model, however they are sold. In particular, the same standards must be used for vehicles sold through factory-owned branches and through independent dealers;

(5) A standard once set must be used throughout a model year;

(6) A standard must base model year on either the date of manufacture or features of the vehicle. The standard must be such that all vehicles assigned a model year which are manufactured on the same date with the same features are assigned the same model year;

(7) The model year must be assigned to each vehicle on or before its date of manufacture;

(8) Once a vehicle is assigned a model year, the model year must not be changed. But, mistakes in applying the standards may be corrected;

(9) Dealers must not represent to customers or to state title or registration officials (on application forms or otherwise) that vehicles are of any model years or that they should be titled or registered by any model years other than the model years indicated by the manufacturers on the Certificates of Origin for those vehicles. Dealers must not represent that vehicles are of any model years if no model years are indicated on Certificates of Origin for such vehicles. Manufacturers must not make any such representations or help or encourage dealers to make such representations.

(10) *Exceptions.* (i) Guidelines (2) through (8) do not apply to chassis or incomplete vehicles sold to motor home or recreational vehicle manufacturers who issue separate Certificates of Origin. Manufacturers of such chassis or incomplete vehicles need not assign model years to these vehicles. If they do not assign model years, they must put on Certificates of Origin, the words "Model Year" or "Year," followed by "NA" or "Not Applicable" or "None."

(ii) As indicated in Guide (2) manufacturers do not have to assign model years to vehicles shipped to any state which does not identify vehicles by model year on title or registration papers. Manufacturers who do not assign model years to vehicles shipped to such a state, must put on the Certificates of Origin the words "Model Year" followed by "NA" or "Not Applicable" or "None."

INTERPRETATION AND ENFORCEMENT

The Commission recognizes that this Enforcement policy Statement may not provide clear guidance in every situation that may arise. The staff of the Bureau of Consumer Protection will be available to answer questions and help industry members comply with these guidelines. Should subsequent investigation disclose violations of law, the Commission will take appropriate enforcement action.

(Sec. 6, 38 Stat. 721 (15 U.S.C. 46); 80 Stat. 378 (5 U.S.C. 552))

[44 FR 30322, May 25, 1979]

§ 14.12 Use of secret coding in marketing research.

(a) The Federal Trade Commission has determined to close its industry-

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wide investigation of marketing research firms that was initiated in November 1975, to determine if the firms were using questionnaires with invisible coding that could be used to reveal a survey respondent's identity. After a thorough investigation, the Commission has determined that invisible coding has been used by the marketing research industry, but it is neither a commonly used nor widespread practice. Moreover, use of the practice appears to have diminished in recent years. For these reasons, the Commission has determined that further action is not warranted at this time.

(b) However, for the purpose of providing guidance to the marketing research industry, the Commission is issuing the following statement with regard to its future enforcement intentions. The Commission has reason to believe that it is an unfair or deceptive act or practice, violative of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to induce consumers to provide information about themselves by expressly or implicitly promising that such information is being provided anonymously, when, in fact, a secret or invisible code is used on the survey form or return envelope that allows identification of the consumer who has provided the information.

(c) While the Commission has made no final determination regarding the legality of the foregoing practice, the Commission will take appropriate enforcement action should it discover the practice to be continuing in the future, and in the event that it may be causing substantial consumer injury. Among the circumstances in which the Commission believes that the use of secret coding may cause significant consumer harm are those in which:

(1) A misleading promise of anonymity is used to obtain highly sensitive information about a consumer that such consumer would not choose to disclose if he or she were informed that a code was being used that would allow his or her name to be associated with the response; and (2) information of any sort is used for purposes other than those of the market survey.

[43 FR 42742, Sept. 21, 1978]

§ 14.15 In regard to comparative advertising.

(a) *Introduction.* The Commission's staff has conducted an investigation of industry trade associations and the advertising media regarding their comparative advertising policies. In the course of this investigation, numerous industry codes, statements of policy, interpretations and standards were examined. Many of the industry codes and standards contain language that could be interpreted as discouraging the use of comparative advertising. This Policy Statement enunciates the Commission's position that industry self-regulation should not restrain the use by advertisers of truthful comparative advertising.

(b) *Policy Statement.* The Federal Trade Commission has determined that it would be of benefit to advertisers, advertising agencies, broadcasters, and self-regulation entities to restate its current policy concerning comparative advertising.[1] Commission policy in the area of comparative advertising encourages the naming of, or reference to competitiors, but requires clarity, and, if necessary, disclosure to avoid deception of the consumer. Additionally, the use of truthful comparative advertising should not be restrained by broadcasters or self-regulation entities.

(c) The Commission has supported the use of brand comparisions where the bases of comparision are clearly identified. Comparative advertising, when truthful and nondeceptive, is a source of important information to consumers and assists them in making rational purchase decisions. Comparative advertising encourages product improvement and innovation, and can lead to lower prices in the marketplace. For these reasons, the Commission will continue to scrutinize carefully restraints upon its use.

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[1] For purposes of this Policy Statement, comparative advertising is defined as advertising that compares alternative brands on objectively measurable attributes or price, and identifies the alternative brand by name, illustration or other distinctive information.

(1) *Disparagement.* Some industry codes which prohibit practices such as "disparagement," "disparagement of competitors," "improper disparagement," "unfairly attaching," "discrediting," may operate as a restriction on comparative advertising. The Commission has previously held that disparaging advertising is permissible so long as it is truthful and not deceptive. In *Carter Products, Inc.,* 60 F.T.C. 782, *modified,* 323 F.2d 523 (5th Cir. 1963), the Commission narrowed an order recommended by the hearing examiner which would have prohibited respondents from disparaging competing products through the use of false or misleading pictures, depictions, or demonstrations, "or otherwise" disparaging such products. In explaining why it eliminated "or otherwise" from the final order, the Commission observed that the phrase would have prevented

> respondents from making truthful and non-deceptive statements that a product has certain desirable properties or qualities which a competing product or products do not possess. Such a comparison may have the effect of disparaging the competing product, but we know of no rule of law which prevents a seller from honestly informing the public of the advantages of its products as opposed to those of competing products. 60 F.T.C. at 796.

Industry codes which restrain comparative advertising in this manner are subject to challenge by the Federal Trade Commission.

(2) *Substantiation.* On occasion, a higher standard of substantiation by advertisers using comparative advertising has been required by self-regulation entities. The Commission evaluates comparative advertising in the same manner as it evaluates all other advertising techniques. The ultimate question is whether or not the advertising has a tendency or capacity to be false or deceptive. This is a factual issue to be determined on a case-by-case basis. However, industry codes and interpretations that impose a higher standard of substantiation for comparative claims than for unilateral claims are inappropriate and should be revised.

(Sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45)

[44 FR 47328, Aug. 13, 1979]

§ 14.16 Interpretation of Truth-in-Lending Orders consistent with the Truth-in-Lending Simplification and Reform Act and Revised Regulation Z.

Introduction

The Federal Trade Commission (FTC) has determined that there is a need to clarify the compliance responsibilities under the Truth-in-Lending Simplification and Reform Act of 1980 (Pub. L. 96-221, 94 Stat. 168) and revised Regulation Z (12 CFR 226, 46 FR 20848) of those creditors subject to final cease and desist orders issued prior to April 1, 1981, which require compliance with provisions of the original Truth-in-Lending statute and prior Regulation Z. Clarification is necessary because the Truth-in-Lending Simplification and Reform Act and revised Regulation Z significantly relax prior Truth-in-Lending requirements on which provisions of more than 300 outstanding orders are based. The policy statement provides that the Commission will interpret and enforce Truth-in-Lending provisions of all orders issued prior to April 1, 1981, so as to impose no greater or different disclosure obligations on creditors under order than are required generally of creditors under the new law.

Policy Statement

(a) All cease and desist orders issued by the Federal Trade Commission prior to April 1, 1981, which require compliance with provisions of the Truth-in-Lending Act (Title I, Consumer Credit Protection Act, 15 U.S.C. 1601) and Regulation Z (12 CFR 226) will be interpreted and enforced consistent with the amendments to Truth-in-Lending incorporated by the Truth-in-Lending Simplification and Reform Act of 1980, and the revision of Regulation Z implementing the same, promulgated on April 1, 1981 (46 FR 20848) by the Board of Governors of the Federal Reserve System. Likewise, the Federal Reserve Board staff commentary to revised Regulation Z (46 FR 50288, October 9, 1981) will be read into interpretations of requirements of existing orders.

(b) During the period April 1, 1981, to October 1, 1982, revised Regulation Z and the prior regulation are concurrently effective. Creditors under order may begin complying with the revised regulation at any time during the transition period, but they must be in compliance by October 1, 1982. The compliance alternatives of creditors subject to Commission orders during the transition period and after October 1, 1982, are as follows:

(1) During the transition period, Truth-in-Lending provisions of existing orders will be interpreted as written until such time as the creditor elects to comply with revised Regulation Z.

(2) Any creditor which elects to comply with revised Regulation Z prior to October 1, 1982, must comply with all applicable requirements of the revised regulation. Thus, in any single credit transaction creditors under order cannot take advantage of the simplified regulations' less burdensome disclosure requirements without also complying with the new disclosure requirements.

(3) Effective October 1, 1982, or at any earlier time that a creditor elects to comply with revised Regulation Z, compliance with the simplified credit disclosure requirements will be considered compliance with the existing order; and,

(i) To the extent that revised Regulation Z deletes disclosure requirements imposed by the order, compliance with these requirements may be eliminated; however,

(ii) To the extent that revised Regulation Z imposes additional disclosure or format requirements, a failure to comply with the added requirements will be considered a violation of section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

(4) A creditor must continue to comply with all provisions of the order which do not relate to Truth-in-Lending requirements or are unaffected by revised Regulation Z. These provisions are not affected by this policy statement and will remain in full force and effect.

Staff Clarifications

The Commission intends that this Enforcement Policy Statement obviate the need for any creditor to file a petition to reopen and modify any affected order under § 2.51 of the Commission rules of practice. However, the Commission recognizes that the policy statement may not provide clear guidance to every creditor under order. The staff of the Division of Enforcement, Bureau of Consumer Protection, will respond to written requests for clarification of any order affected by this policy statement.

(Secs. 5, 18, 23; 38 Stat. 719-721, as amended by Pub. L. 96-252, 94 Stat. 374, 376, 390; 15 U.S.C. 45, 57a, 57b-4; sec. 108(d), 82 Stat. 146, 150, as amended by Pub. L. 96-221, 94 Stat. 168, 15 U.S.C. 1601, 1607d)

[47 FR 13323, Mar. 30, 1982]

§ 14.17 Franchise rule enforcement protocol.

The Commission believes that the following questions are relevant in deciding when to initiate an enforcement action under the Franchise Rule. The Commission does not intend to suggest that it must possess answers to each of the questions before initiating any action. In some cases, answering certain questions may involve undue costs. Moreover, the answers to even a few questions may so positively indicate that a proposed action is in the public interest so that the Commission need not consider other questions. The protocol is a framework for analysis, not a rigid imperative.

(a) *Coverage Under the Rule.* (1) Is the proposed defendant covered by the Rule? Analyze the relationship between the proposed defendant and its distributors in the context of the rule's definitional prerequisites to coverage.

(2) To what extent will proof of coverage be based on the proposed defendant's own writings, such as its contract or promotional materials, as opposed to witnesses' testimony about salespersons' promises?

(3) Is it likely that the proposed defendant will challenge coverage? If so, will such challenge be based on a question of interpretation or a question of facts; that is, is the dispute over

whether a given fact situation constitutes a franchise or what the facts are?

(4) If Rule coverage is uncertain, would a Section 5 action be more appropriate?

(b) *Compliance With the Rule.* (1) Was the basic disclosure document provided to prospective franchisees? Were all required disclosures made completely and accurately?

(2) Was timely disclosure made?

(3) Did the franchisees have at least 10 business days to review the disclosures?

(4) Were earnings claims made? If so, was an earnings claims disclosure document provided? Does there appear to be substantiation for any claims made?

(5) Were there any other rule violations present?

(c) *Consumer Injury.* (1) How many franchises were sold in violation of the rule?

(2) What is the aggregate dollar volume of revenue received by the franchisor from franchise sales in violation of the rule, and the franchisor's current net worth?

(3) What is the current or expected rate of franchise sales?

(4) How much have franchisees lost? To what extent has their behavior after purchase contributed to or mitigated their losses? Conversely, to what extent has their franchisor's behavior contributed to or mitigated their losses?

(5) What percentage of the franchisor's franchisees have experienced economic loss from their investments? Can this loss be attributed, in whole or in part, to Rule violations?

(d) *Remedies.* (1) Analyze the efficiency of injunctions, civil penalties and consumer redress.

(2) Discuss the need for proposed preliminary relief, such as an asset freeze and preliminary injunction.

(3) Who are the key persons who formulate, direct and control the company policies who should be individually named in the complaint?

(4) What is the financial condition of each proposed defendant? What can we reasonably anticipate collecting in civil penalties or redress from corporate and individual defendants?

(5) If consumer redress is recommended, what is the estimated loss and how is it calculated?

(6) How viable or likely is non-Commission enforcement, such as private actions or state or local prosecution, as an alternative to Commission action?

(7) To what extent would each type of violation identified have been likely to influence decisions by potential franchisees?

(e) *Other Conditions.* (1) What resources are needed to bring the action to an acceptable conclusion?

(2) Will the action deter other potential violators from failing to comply with the Rule?

(38 Stat. 717, as amended, 15 U.S.C. 41-58)

[49 FR 50632, Dec. 31, 1984]

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15.161 Advertising promoting sale of information and a product.
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15.165 Premerger clearance: Deteriorating financial condition.
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15.167 Premerger clearance: Deteriorating industry.
15.168 Premerger clearance: Imminent insolvency.
15.169 Premerger clearance: Financial distress.
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15.199 Agreement by processors to sell at prices higher than minimums set by State regulation.
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15.206 Marking requirements for apparel of U.S. components assembled abroad.
15.207 "Made in U.S.A." label on answering machine composed of domestic and foreign made components.
15.208 Disclosure of origin of golf clubs made in this country from imported parts.
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15.243 Receipt of discount in lieu of brokerage by respondent wholesale food distributor.
15.244 Disclosure of foreign origin of nasal cannula required.
15.245 Commission denies approval of proposed joint venture corporation composed of five competing manufacturers to bid on prime contract to furnish products of uniform specification.

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15.246 Trade association publication recommending procedures for freight prepayment by manufacturers.
15.247 Disclosure of origin of crib mattresses, etc. made in this country using imported outside covers.
15.248 Validation of guarantee—time requirement.
15.249 Trade association code providing that members will not advertise sales below cost.
15.250 Formation of local trade associations by statewide trade association.
15.251 Disclosure of country of origin of imported fasteners.
15.252 Location of foreign origin disclosure.
15.253 Extended credit terms for newly established stores in impoverished urban areas approved.
15.254 Operation of exclusive check-cashing concessions in retail stores.
15.255 Misrepresentation as to origin of flatware.
15.256 Use of unqualified word "Diamond" to describe abrasive discs containing other materials.
15.257 Legality of trade association suggesting rental rate for containers in which industry products are sold.
15.258 Promotional assistance plan limited in value to percentage of purchases.
15.259 Commission has no objection to proposed merger of two noncompeting quarry and building materials companies.
15.260 Synthetic emeralds.
15.261 Promotional assistance based on percentage of purchases during a fixed time period.
15.262 Use of manufacturers' suggested retail prices accompanied by a disclaimer.
15.263 Lower price to "stocking" dealers.
15.264 Stocking, quantity, and cumulative discounts.
15.265 Personal deodorant spray.
15.266 Magazine sponsored contest to win a house.
15.267 Legality of describing green tourmaline as "Emerald Green Tourmaline" or "Precious Tourmaline".
15.268 Agreement not to advertise prices.
15.269 Pooling of allowances for purposes of joint advertising.
15.270 Necessity for disclosing country of origin of imported ski.
15.271 Adoption of penalty clause which inhibits competitors.
15.272 Sales promotion plan—opportunity to buy at a savings.
15.273 Publication by trade association of suggested resale price schedule for materials.

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15.274 Proposal to reduce discounts granted small volume purchasers.
15.275 Necessity for disclosing country of origin of imported watchbands.
15.276 Disclosure of foreign assembly not required for product made of domestic components.
15.277 Formation of consumers savings group.
15.278 Commission approves proposed franchise agreement for chain of pizza and sandwich restaurant-carryout shops.
15.279 Commission advises agricultural cooperatives it has no objection to proposed purchase of country elevators of financially-troubled direct competitor.
15.280 Commission advised applicant it cannot approve a proposed partial acquisition of a direct competitor's business that may substantially increase applicant's market power.
15.281 Trade association recommendations with respect to sales periods and services furnished by members and cash discounts by suppliers.
15.282 Marking requirements for shirts assembled in the United States from foreign components.
15.283 Foreign origin—container disclosure for contents of multiple foreign origin.
15.284 Location of foreign origin disclosure.
15.285 Formation of common marketing association by agricultural cooperatives.
15.286 Foreign origin—labeling requirements for tennis shoes made in Virgin Islands with foreign component.
15.287 Publication of advertising standards by private association.
15.288 Receipt of promotional allowances prohibited by order.
15.289 Compost peat.
15.290 Membership in trade association by manufacturer under Commission order.
15.291 Commission refuses to grant blanket approval to small baking company to be acquired by anyone including corporations subject to Commission acquisition-prohibition orders.
15.292 Paua shell being described as "marine opal".
15.293 Commission declines ruling on use of term "humus", and states Peat Industry Trade Practice Rules apply if material comes within certain definitions.
15.294 Advertising on food product wrapper.
15.295 Domestic origin marking on product containing foreign made components.
15.296 "Failing company" theory applied in Commission approval of sale of assets to a competitor.
15.297 Premerger clearance—"Failing company"—portion of fixed assets to be sold to keep company in business.

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15.298 Disclosure of origin of imported lenses finished domestically.
15.299 Disclosure of country of origin of repackaged goods imported in bulk.
15.300 Contest and its advertising by retailer deemed objectionable.
15.301 "Danish" as applied to furniture.
15.302 Promotional plan involving "cents off" coupons and demonstrators.
15.303 Commission does not object to program employing data processing equipment to collect and disseminate actual production and sales information.
15.304 [Reserved]
15.305 Sales below cost provision in ethical advertising guide.
15.306 Commission does not object to computerized inventory control system to be furnished suppliers by third-party promoter subject to certain safeguards for nonparticipating retailers.
15.307 Foreign origin of cloth made into tablecloths in U.S.A.—permissible labeling—proposed trade name and trademark; Commission warnings.
15.308 Commission does not object to proposed acquisition by dairy products producer-processor-distributor of another processor-distributor.
15.309 Inclusion of provision in cooperative advertising agreements limiting price advertising by retailers.
15.310 Disclosure of country of origin of imported watch bands.
15.311 Origin disclosure of imported upper material used in shoes.
15.312 Commission declined to approve proposed three party promotional plan in the food industry.
15.313 Marking of 18 karat white gold ring with platinum baguette prongs.
15.314 Advertising by manufacturers in an independently published periodical.
15.315 Foreign origin disclosure of wearing apparel partly made in a foreign country.
15.316 Foreign origin disclosure of imported bearings.
15.317 Commission declines to issue advisory opinion.
15.318 Commission refusal to grant blanket approval to small dairy to be acquired by any corporation subject to Commission acquisition-prohibiting orders.
15.319 Sales price and lease rate for a book need not be identical.
15.320 Disclosure of origin of imported components used in manufacture of firearms.
15.321 Sale of unlabeled American made products.
15.322 Supplier advertising in an independently published periodical.
15.323 Disclosure of imported electronics equipment.

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15.324 "Free hosiery for life" offer to obtain sales representatives.
15.325 Marketing 10-year-old unused equipment as new is deceptive.
15.326 Country of origin marking requirements for product assembled in Puerto Rico of domestic and foreign components.
15.327 Disclosure not required of origin of imported upper material used in shoes.
15.328 Organization of warehouse distribution center for a jobber buying group.
15.329 Dissemination of uniform warranty plan by trade association to members.
15.330 Proposed advertising for orthopedic pillow.
15.331 Disclosure of origin of imported food product.
15.332 Publication of advertising standards by private association.
15.333 Manufacturer-wholesaler relationships; different discounts; refusals to deal; termination of further sales.
15.334 Location of foreign origin disclosure.
15.335 Refusal of membership in trade association.
15.336 Legality of membership by brewer in beer wholesalers' trade association.
15.337 Disclosure of origin of imported hand sprayers and squeeze bottles.
15.338 Disclosure of origin of imported seam ripper blades.
15.339 Disclosure of origin of imported fishing lures.
15.340 Location of foreign origin label on imported engine parts.
15.341 Disclosure of origin of imported motors.
15.342 Location of term "irregular" to describe shirts.
15.343 Disclosure of origin of imported circular saw discs.
15.344 Premerger clearance not granted; grocery stores in concentrated market.
15.345 Survey of professional compensation by employing institutions.
15.346 [Reserved]
15.347 Disclosure of origin of imported shoes.
15.348 Disclosure of origin of imported turpentine.
15.349 Disclosure of origin of imported components used in fork lift trucks.
15.350 Accreditation program for producers of concrete and concrete products.
15.351 Use of symbols and names having fur-bearing animal connotations in labeling textile fiber products.
15.352 Stereo tape cartridge club; consumer credit regulations will apply.
15.353 Use of the term "hand carved" to described furniture.
15.354 [Reserved]

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15.355 Disclosure of origin of partly foreign-made textile products.
15.356 [Reserved]
15.357 Supplier services furnished through third party.
15.358 Disclosure of foreign country where textile products are assembled.
15.359 Trade association's proposed compilation and publication of certain financial data.
15.360 Use of descriptive phrase to describe furniture.
15.361 Credit reporting plan by trade association.
15.362 Full disclosure of facts necessary when seller of one product makes gift of another product to purchaser in exchange for names of prospective purchasers.
15.363 Pricing of replacement glass for automobiles.
15.364 Origin disclosure of imported thread guides.
15.365 Request denied for approval to sell dairy company to any dairy company under Commission order.
15.366 Labeling of imported magnetic recording tape.
15.367 [Reserved]
15.368 Disclosure of origin of imported plastic vinegar bottles.
15.369 Disclosure of foreign origin required in mail order advertising.
15.370 Origin of cashmere sweaters.
15.371 Use of "12 karat gold filled" to describe earrings.
15.372 Use of "Made in U.S.A." label.
15.373 Trade association code of conduct found unobjectionable.
15.374 Tripartite promotional plan for larger supermarkets.
15.375 "Made in U.S.A." label on clock-radios containing an imported component.
15.376 Disclosure of foreign labor services performed on domestically produced textile fiber products.
15.377 Device for creasing cigarettes.
15.378 Savings claims based upon comparison with comparable merchandise.
15.379 [Reserved]
15.380 Use of order cards in packages of merchandise or in direct mailing material.
15.381 Disclosure of origin of imported ignition coil parts.
15.382 Franchise agreement with fair trade price schedule.
15.383 Labeling of leather gloves partly domestic and partly of foreign origin.
15.384 Special discount package price to new dealers.
15.385 Disclosure of origin of imported locks.

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15.386 Origin of imported brush for hair roller.
15.387 [Reserved]
15.388 "Bonus" portable typewriter offer.
15.389 Disclosure of foreign assembly operations on ladies' blouses.
15.390 Offer of incentive bonus to customers.
15.391 Labeling of products composed of ground leather and fabric.
15.392 Disclosure of origin of partly foreign-made foundation garments.
15.393 Request for reconsideration of Advisory Opinion 333 (§ 15.333) pertaining to wholesale-manufacturer relationship; freight saving as cost justification.
15.394 Approval for merger of privately owned tufting machinery and equipment manufacturers.
15.395 Retailer price reporting plan.
15.396 Use of term "Peat Moss-Pifine and Sedge".
15.397 Origin of dresses partly made in United States and Haiti.
15.398 Advertising of hamburgers made of chuck and plate.
15.399 Plan for merchandising by lottery.
15.400 Labeling of imported magnetic recording tape.
15.401 Designation of landscaping material by volume on containers.
15.402 Marking of shoe soles composed of ground leather.
15.403 Union-employer agreement to cease importing a competitive product.
15.404 Franchise sales promotion plan with pyramiding franchises and "Functional Override" commission implications.
15.405 Disclosure of imported fabric used in American flags.
15.406 Origin labeling on kits containing imported beads.
15.407 Association discussion limited to voluntary standardization not violative of outstanding cease and desist order.
15.408 Debt collection forms and envelopes which simulate Government or other official documents.
15.409 Labeling of reconditioned automotive parts.
15.410 Speed ratings and safety claims for tires.
15.411 Tripartite promotional plan involving use of "cents off" coupons.
15.412 Country of origin labeling on imported textile fiber garments.
15.413 Country of origin labeling on boxes containing imported bearings.
15.414 Uniform warranty and warranty service system.
15.415 Country of origin labeling on crates containing unfinished imported raincoats and on garments after being finished in the United States.

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15.416 Meaning of phrase "Leave your pocketbook at home".
15.417 Use of term "manufacturer".
15.418 [Reserved]
15.419 Tripartite promotion based on television game show.
15.420 Multiple foreign origin of parts disclosure on partially imported toys.
15.421 Origin disclosure on imported (9 percent to 15 percent) air filter parts.
15.422 Preticketing of imported candles.
15.423 [Reserved]
15.424 Tripartite promotional program using trash receptacle panels for advertising.
15.425 Combining advertising for mailing purposes.
15.426 Quality designation on jewelry of identical construction.
15.427 Guarantee advertising for refrigerator compressors.
15.428 Unqualified use of the word "Jewel" disapproved for advertising synthetic diamond.
15.429 Applicability of flammability standards to rental mats.
15.430 Advertising in retailer's catalog by suppliers disapproved.
15.431 Tripartite advertising plan disapproved.
15.432 Proposed statistical program.
15.433 Disclosure of foreign origin of fish hooks.
15.434 Proposed franchise program for replacement glass dealers.
15.435 Publication of a monthly bulletin for circulation to suppliers of metal fabrications approved.
15.436 Disclosure of origin of seam ripper blades.
15.437 Proposed method of selling denture cleanser disapproved.
15.438 Intermediary's tripartite promotional assistance plan approved.
15.439 Promotional plan involving pictures of products on grocery shelves qualifiedly approved.
15.440 Distribution of a weekly magazine through retail outlets qualifiedly approved.
15.441 Disapproval of the marking "Made in U.S.A." on finished items machined and assembled in U.S. from imported components.
15.442 Tripartite promotional plan approved.
15.443 Dual designation of country of origin disapproved.
15.444 Game of chance promotion given qualified approval.
15.445 Location of disclosure of foreign origin.
15.446 Disclosure of former name of magazine unnecessary.

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15.447 Cooperative advertising by milk producers approved.
15.448 Commission disapproves use of card which appeared to be a credit card but was not.
15.449 Term "Diamonflare" disapproved for advertising a product which is not a natural diamond.
15.450 Tripartite promotional plan using recipe coupons approved.
15.451 Marking of foreign origin on electrical relay devices.
15.452 Intermediary's tripartite promotional assistance plan qualifiedly approved.
15.453 Commission declines to issue an advisory opinion on promotional game.
15.454 Offer of a "free" balloon disapproved.
15.455 Commission declines to issue advisory opinion on reciprocal advertising plan.
15.456 Disclosure of foreign origin of products in newspaper advertising.
15.457 Legality of proposed standard certification program.
15.458 Commission declines to issue an advisory opinion re manufacturer's dealer purchase stimulation plan.
15.459 Request for advisory opinion re merger declined.
15.460 Intermediary's tripartite promotional assistance plan approved.
15.461 Advisory opinion on debt collection agency withheld.
15.462 Promotional assistance plan using shopping carts disapproved.
15.463 Advisory opinion declined on mail order business to sell acne remedy.
15.464 Sale of promotional assistance device approved.
15.465 Advertising of a book on investing approved.
15.466 Legality of proposed product quality certification program.
15.467 Legality of distribution to automotive parts manufacturers of information on interchangeability of parts manufactured by different companies.
15.468 Use of the words "Golden Finish," "Gold Brushed," and "Golden Manner," in advertising of certain gold plated costume jewelry.
15.469 Intermediary's tripartite promotional assistance plan disapproved.
15.470 Tripartite promotional assistance plan approved.
15.471 Designation of gold content on ball point pens.
15.472 Commission declines to issue advisory opinion re proposed merger.
15.473 Applicability of flammability standard to bath mats.
15.474 Legality of proposed subscription renewal voucher offer.

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15.475 Maintenance of a pool of information by trade association proper.
15.476 Representations of gold content on jewelry.
15.477 Credit reporting plan disapproved.
15.478 By-laws of organization for marketing research approved.
15.479 Cumulative annual rebate plan disapproved.
15.480 Commission declines to issue advisory opinion.
15.481 Proposed acquisition.
15.482 Wholly-owned subsidiary may not collect consumer indebtedness without identifying the parent company as owner.
15.483 "Backhaul" allowances advisory opinion affirmed.
15.484 Foreign ownership or control of a corporation in a Webb-Pomerene Association.
15.485 Location of debt collection agency office.
15.486 Averaging individual profit and loss statements in reports to association members.
15.487 Collecting and reporting statistical information from members of an association.
15.488 Association by-laws regarding membership may not be arbitrary or discriminatory.
15.489 Refund must be offered to subscribers to discontinued magazine.
15.490 Drop shipments proper when warehouse distributor does not stock item.
15.491 Association may prepare dealer's catalog provided no price information is included.

AUTHORITY: 38 Stat. 717, as amended, 49 Stat. 1526; 15 U.S.C. 41-58; 15 U.S.C. 13, unless otherwise noted.

§ 15.1 Use of the word "chamois."

Any use of the word "chamois" in conjunction with a product not made from: (a) The skin of the Alpine antelope or (b) sheepskin fleshers which have been oil-tanned after removal of the grain layer is unlawful and a deceptive act or practice in commerce.

[30 FR 14201, Nov. 11, 1965]

§ 15.2 Toy catalog advertising payments.

No objection will be raised to payments by a toy manufacturer for advertising in a toy catalog published by a firm not owned or controlled by or in any way affiliated with any toy jobber customer of the manufacturer if the catalogs are available, in a practical business sense, to all of the manufacturer's jobber customers.

[30 FR 14317, Nov. 16, 1965]

§ 15.3 Three-party promotional assistance plans.

(a) Since June 1962, when its Advisory Opinion procedure was established, the Commission has received many requests for opinions regarding promotional assistance plans which have been within the purview of section 2 (d) and (e) of the Robinson-Patman amendment to the Clayton Act and section 5 of the Federal Trade Commission Act. In this context, promotional assistance is defined as the payment of money or the furnishing of services or facilities by a supplier to a customer for the purpose of promoting the customer's resale of the supplier's products. Payments for or the furnishing of advertising, demonstrators, displays, special packaging, prizes for contests, special handling of the supplier's products are typical examples.

(b) In brief, the laws administered by the Commission provide that a supplier in commerce furnishing promotional assistance must offer it to each of his competing customers so that it is realistically available to them on proportionally equal terms. The basic test for a customer's eligibility under the law is whether, in reselling the supplier's product, he competes against any of those customers to whom the assistance is offered. If he does compete in its resale, the supplier's offer must be made to him, whether he operates a grocery, drug, variety or other type of store. In addition, a reasonable alternative means of participation must be included in such plans for eligible customers who are unable to use the basic plan.

(c) From the standpoint of a supplier's customer, if he accepts such assistance with knowledge, actual or reasonably imputable, that his competitors selling the supplier's products have not been offered proportionally equal assistance by the supplier, he may be engaging in an unfair trade practice violative of section 5 of the Federal Trade Commission Act. In this connection, the Commission's Guides for Advertising Allowances set forth information in greater detail as to the legal responsibilities of suppliers and their customers with regard to their joint promotional activities.

(d) A number of the plans submitted for an Advisory Opinion, however, have been devised by a requesting party who is neither a supplier nor a customer but a hopeful intermediary who had approached both suppliers and customers to interest them in his plan. Examples of some of the plans submitted include furnishing in-store music with commercials, in-store projection or display of advertising messages, outdoor advertising, in-store display and distribution of receipe cards and the like.

(e) In the Advisory Opinions rendered in response to such requests the Commission has pointed out that the fact that an intermediary is positioned between the supplier and the supplier's customers—the retailers—does not affect applicability of the law to the promoter's plan. Even though an intermediary is employed, it remains the supplier's responsibility to make certain that each of the supplier's customers who compete with one another in reselling his products is offered either an opportunity to participate in the promotional assistance plan on proportionally equal terms or a suitable alternative if the customer is unable as a practical matter to participate in the plan; if not, the supplier, the retailer and the promoter participating in the plan may be acting in violation of section 2 (d) or (e) of the amended Clayton Act and/or section 5 of the Federal Trade Commission Act.

[30 FR 14490, Nov. 19, 1965]

§ 15.4 Publication of product standards by a trade association as an industry goal.

(a) The Federal Trade Commission rendered an advisory opinion informing a trade association that no objection will be raised to its distribution of product standards as an industry goal.

(b) The association had requested advice on whether it may legally distribute a booklet giving standards which represent the ideal of a top quality industry product. The booklet was prepared about 2 years ago but it was subsequently determined that the standards were so high as to make them impracticable as commodity standards for the whole industry.

(c) The association is now interested in distributing the booklet merely as an ideal and as a goal for which the industry should be striving, and questioned whether or not this might be considered as acting in restraint of trade.

(d) The Commission's advice was that there could be no objection to the distribution of this booklet under the circumstances and for the purpose stated in the letter from the asosciation, provided it removes any procedure, practice or requirement that seals of approval be given to industry members who meet the standards.

[30 FR 14490, Nov. 19, 1965]

§ 15.5 Manufacturer's setting of minimum resale price for dealers.

(a) An advisory opinion by the Federal Trade Commission notified a manufacturer that, in the circumstances presented, its establishment of a minimum resale price for its dealers would constitute unlawful price-fixing.

(b) The facts related to the Commission by the manufacturer are these. It has three dealers in one city who submit bids for the business of one large consumer. Initially there was enough margin between the manufacturer's list price and the net price to the dealer to allow them to submit competitive bids. However, as competition between the dealers increased, the bid price became lower and lower until now the situation is that none of the three dealers can realize a profit on this business.

(c) They have asked the manufacturer if it can do anything about the situation. One dealer suggested that the manufacturer should go on record as establishing a minimum price below which no dealer can quote. This limit would be in the form of a percentage below list or an actual dollar figure below list. The manufacturer stated to the Commission that this limit will assure the dealer receiving the order of a fair profit for his effort and would not destroy competition between the dealers, who would apparently be left free to compete above the minimum. The manufacturer asked if this can be done legally and if it would have the right to compel dealers to comply with this established limit.

[30 FR 14554, Nov. 23, 1965]

§ 15.6 Three-way promotional program set up by outdoor advertiser and financed by participating grocery chains and their suppliers.

(a) The Federal Trade Commission rendered an advisory opinion dealing with the legality of a proposal by an outdoor advertiser to set up advertising displays featuring food products which will be financed by payments from food suppliers and chain grocery and drug stores.

(b) The Commission said it has accumulated considerable experience with similar tripartite promotional programs in which the promoter of the plan places himself between the supplier and the retailer, who indirectly receives the benefits of the payments made by the supplier to the promoter.

(c) The fact that the promoter acts as middleman in the operation of the plan has been held to be of no legal significance, the Commission said. Instead, it views such plans as an integrated whole and treats them, under proper circumstances, as though the contracts or arrangements were made directly between the suppliers and the participating retailers.

(d) Viewed in this light, the Commission advised, it would appear that the proposed program is expressly tailored to fit the needs of the participating suppliers' larger customers and therefore completely lacks the element of proportionally equal treatment of all those suppliers' competing customers which is required by section 2(d) of the Robinson-Patman amendment of the Clayton Act.

(e) The Commission said that it is "safe to assume that each of the suppliers who will be asked to participate in this proposal have customers in the area other than grocery and drug chains. Such suppliers would risk liability under sections 2(d) and 2(e) of the Clayton Act by participating in any joint promotional venture which is not even offered to such customer or which, if offered, would be at a prohibitive cost to small retailers or which would be impractical for those retailers who may handle only a few of the products of the suppliers participating in the plan. The law requires that all of these customers must receive proportionally equal treatment."

(f) "Thus, the suppliers who participate in * * * [this] plan must make certain that the smaller retailers are offered a chance to participate and must offer a suitable alternative to those retailers for whom the plan is functionally unavailable."

[30 FR 14554, Nov. 23, 1965]

§ 15.7 Resumption of advertising by a manufacturer in a trade buying guide formerly but no longer owned by a wholesaler customer.

(a) The Federal Trade Commission has rendered an advisory opinion regarding the proposed resumption of advertising by a manufacturer of drugs and cosmetics in a drug trade buying guide which was previously published by a wholesaler customer but whose present owner-publisher is not connected in any way with any customer of the manufacturer.

(b) The Commission's advice was that no objection could be raised to payments by a manufacturer for advertising in buying guides if the guides are available, in a practical business sense, to all of his wholesaler customers.

(c) The advisory opinion noted: "Payments for advertising in a buying guide published by a firm which is not owned or controlled by, or in any way directly or indirectly affiliated with, any customer of the advertiser or group or class of such customers do not violate section 2(d) of the amended Clayton Act where no discriminatory benefit is conferred by such payments on a particular customer, or class or group of customers, over competitors. The Commission has been informed that the present owner-publisher * * * has no connection whatsoever with * * * any * * * drug or cosmetic company or group thereof; that the buying guide is available at low cost to all drug wholesalers and is apparently not designed to be usable only by particular wholesalers, or classes or groups of wholesalers; that very effort is made to distribute the buying guide as broadly as possible among drug wholesalers; and that distribution is not limited to any particular wholesalers or group or class of wholesalers."

[30 FR 14554, Nov. 23, 1965]

§ 15.8 Foreign origin disclosure.

(a) An American manufacturer has been advised that the Federal Trade Commission would have no objection to its proposed manner of disclosing the origin of an office machinery unit containing a foreign-made part.

(b) The label considered by the Commission identifies the foreign part and the country in which it was made and states that the manufacturer in question has manufactured the remainder of the unit and assembled it in this country.

[30 FR 14555, Nov. 23, 1965]

§ 15.9 Labeling of containers for imported knives.

(a) The Federal Trade Commission has rendered an advisory opinion regarding the labeling of containers for knives which are imported from Japan and to be stamped "Made in Japan" by an importer using the word "manufacturing" in his trade name.

(b) The Commission's advice was that in the absence of any showing of material deception, a proceeding by it to require disclosure of Japanese origin of the knives on the containers would not appear to be warranted.

(c) The Commission said the same advice would apply if the name of the importer is printed on the container provided the "Made in Japan" legend on the knives is readily visible upon casual inspection by prospective purchasers prior to purchase. However, if the disclosure does not meet this condition, it will be necessary to make a clear and conspicuous disclosure of Japanese origin on the box in close proximity to the name and address of the importer.

(d) The Commission made the following comments with respect to use of the word "manufacturing" by an importer in his trade name but without in any way passing upon its propriety:

The general rule is that a company may not use this word in its trade name unless it in fact owns, operates or controls a factory where the merchandise is manufactured. The reason is that there is a preference for dealing directly with the manufacturer, such preference being due in part to a belief that lower prices and other advantages may be obtained.

[30 FR 14656, Nov. 25, 1965; 30 FR 16001, Dec. 23, 1965]

§ 15.10 Cooperative advertising allowances.

(a) A manufacturer was informed in an advisory opinion that the requirements of section 2(d) of the amended Clayton Act will be satisfied where the proposed advertising allowance program reflects that alternative methods of promotion are available to customers unable to use the preferred method of advertising in the regular course of their business.

(b) As explained by the manufacturer, all of its customers will be offered advertising allowances equal to 1 percent of net purchases to defray up to a maximum of 50 percent of the actual cost of advertising its branded, first-quality products in any ACB (Advertising Checking Bureau, Inc.) daily and Sunday newspaper. Where a retailer is unable in a practical business sense to advertise in such newspaper the program will provide him with adequate alternative methods of sales promotion such as, but not limited to, other newspapers, letter stuffers, or handbills as will enable him to earn the allowances specified. A retailer may use up to 30 percent of his allowance in Christmas catalog advertising where the brand name or label is prominently mentioned, payment for which is based on catalog circulation. New accounts and those with which the manufacturer has had less than 1 year's experience will be offered the same allowance, payment for which will be computed on the basis of purchases for the first full quarter year. All accounts will be notified of the program by first-class mail, by the manufacturer's sales representatives and by notices accompanying invoices.

[30 FR 15210, Dec. 9, 1965]

§ 15.11 Labeling of truss plates manufactured from imported steel.

(a) The Commission was requested to advise whether or not it would be permissible to label finished truss plates made from imported galvanized steel coils as a domestic product manufactured in the U.S.A. without any reference to the origin of the steel. The plates are cut and stamped to size in this country and further stamped to form tooth-like fastening devices as part of the finished plate.

(b) The Commission advised that it would not be proper to label these plates as made in the U.S.A. since that would constitute an affirmative representation that they were entirely made in this country, which is not the fact unless, of course, the label also discloses in a clear and conspicuous manner the fact that the steel in said plates is imported.

[30 FR 15584, Dec. 17, 1965; 30 FR 16001, Dec. 23, 1965]

§ 15.12 Promotional assistance—publisher payments to a single reseller of the publisher's periodical.

(a) The Federal Trade Commission advised a publisher of a periodical that the proposed promotional assistance plan described below would be violative of section 2(d) of the Robinson-Patman amendment to the Clayton Act. Section 2(d) Provides in essence that it is unlawful for a supplier in interstate commerce to offer promotional assistance to his customer in reselling the supplier's product unless a proportionally equal offer also is made to the customer's competitors who sell the same product.

(b) Essentially, the proposed plan provided for a payment of $75 weekly to the operator of a chain of newsstands. In return, the operator would: (1) Place the publication on sale on the newsstands, (2) submit daily sales reports to the publisher for each newsstand, (3) favorably display the publication on the stands and (4) provide stock control to avoid sellouts.

(c) The plan was deemed violative of section 2(d) because it was to be offered only to the one operator of newsstands. Under the plan, his competitors in selling the publication were not to be offered promotional assistance—proportional or otherwise.

(d) The Commission's Guides for Advertising Allowances discuss the requirements for such promotional assistance plans in considerable detail and will be of assistance to persons contemplating their use.

[31 FR 85, Jan. 5, 1966]

§ 15.13 Discount-buying membership organization.

(a) A Federal Trade Commission advisory opinion informed a promoter that there were no actionable trade restraints inherent in his proposed plan.

(b) As explained by the promoter, the plan involved the formation of a membership organization. Membership, available at an annual fee to the general public without restriction, confers the right to purchase at a stated discount from the prevailing prices of retail merchants. Local retailers can participate in the plan without restriction.

(c) The Commission pointed out that its approval was limited to the proposed plan itself and no views were expressed as to the plan's implementation. Without imputing any lack of good faith to the requesting party, the Commission noted that if, for example, members of the purchasing public were misled or deceived, or could be misled or deceived, as to benefits available under the plan, such result might be actionable.

[31 FR 1239, Feb. 1, 1966]

§ 15.14 Exclusive use of trademark in designated trading area.

(a) In an advisory opinion the Federal Trade Commission disapproved a contemplated license agreement modification which would give a licensee the exclusive right within a designated trading area to use the licensor's trademark in connection with the licensee's sale of produce purchased from third-party growers.

(b) As the request for an advisory opinion was presented, the requesting licensor, a State agency, owns a registered trademark or certification mark which it licenses through one (1) year, nonexclusive agreements with wholesale distributors for use in connection with their sale of repackaged produce purchased from third-party growers. The purpose of the mark is to advertise and encourage greater use of a particular product, and to protect its original identity.

(c) As a condition for the renewal of a license agreement, the licensor is requiring that the requesting licensee submit his operations to continuous inspection by a designated inspection agency. The requesting licensee indicated that it will be necessary to remodel his plant facilities, and that the initial capital investment and expense of a resident inspector will be considerable. In return for this added expense, the licensee requested that the licensor revise the present license agreement to give him the exclusive right within a designated trading area to use the trademark in connection with his sale of certain produce. It was said that the proposed exclusive license is intended to prevent use of the trademark by competitors in the described trading area in connection with their repackaging and sale of similar produce.

(d) Unlike the ordinary trademark owned by a single producer and applied solely to his goods, the mark here involved is a certification mark owned by a State agency. Such a mark is intended to identify goods produced by many competing growers. Since it is intended that the public take the certification mark as a representation that the only bona fide produce of that type is the produce sold under this mark, restriction of its use to the requesting licensee could result in giving him an unfair competitive advantage over other wholesale distributors who are in fact selling the same produce but who do not have the right to use the certification mark. The result could be to impose an unreasonable restraint, not upon intrabrand competition (as would be the case with the usual exclusive trademark license), but upon competition between competing brands of the produce involved.

(e) The fact that the right to use the certification mark is conditioned upon utilization of the inspection procedure required by the licensor is no justification for insulating the requesting licensee's company from the competition of other repackers of similar produce.

(f) The Federal Trade Commission advised that it is of the opinion that the proposed exclusive license agreement would probably be in violation of section 5 of the Federal Trade Commission Act.

[31 FR 3450, Mar. 5, 1966]

§ 15.15 Proposed trade association resolution by wholesalers suggesting pricing and business policies to their suppliers.

(a) A trade association composed of wholesalers of rebuilt products has requested an advisory opinion from the Commission as to the legality of a proposed Resolution suggesting certain conduct to the trade association of rebuilders who supply the wholesalers. The Resolution would provide, among other things, that rebuilders should give wholesalers 120 days notice in writing of any change in the allowance to be granted for used products turned in for rebuilding purposes; that during this period the wholesalers should receive credit at the old rate on such returned products; and that the rebuilders should incorporate a 30-percent gross profit for the wholesalers when establishing prices for the used products in view of the fact that the wholesalers give an allowance to the retailers who turn in the used products for rebuilding purposes. The association added that there was no agreement not to do business with those rebuilders who declined to follow the practices contained in the Resolution.

(b) The Commission advised that it could not give approval to the adoption of the Resolution. Though the Resolution may be motivated by a purpose to remove evils affecting the industry, it appears to go further than is reasonably necessary to accomplish such result. Even if it were accompanied by disclaimers, there is implicit in the Resolution too grave a danger that it will serve as a device whereby the concerted power of the members of the association is brought to bear to coerce the members of the rebuilders' trade association to conform their pricing policies to the restrictive standards of the Resolution, or at the very least as an invitation to enter into agreements among themselves to do so.

[31 FR 3492, Mar. 8, 1966]

§ 15.16 Advertising by a manufacturer in a customer-connected trade publication.

(a) An advisory opinion dealing with the proposed advertising by a manufacturer of drug items in a drug trade catalogue published by an organization of wholesale druggists has been rendered by the Federal Trade Commission.

(b) The manufacturer was informed that several months previously the Commission had approved the organization's proposed plan of reorganization of the publication which provided that (1) the publication is to be published by a separate corporate subsidiary, (2) the advertising rates to be charged will be no higher than necessary to realize a normal profit for such a publication, and (3) in any event, the profits resulting from the publication will be donated annually to a charitable organization.

(c) "Unless and until the Commission announces the rescission of such approval," the advisory opinion stated, "it will not take the position that any supplier's payment for advertising in * * * (the publication in question) constitutes a payment indirectly to the wholesaler members * * * [of the organization], subject to section 2(d) of the amended Clayton Act."

(d) However, the Commission pointed out that it will continue to regard a supplier who advertises in a publication such as this "as in effect furnishing, through the intermediary of the publisher, a promotional service to those wholesalers who make use of the publication. In order to assure compliance with section 2(e) of the amended Clayton Act, the supplier should ascertain whether in a practical business sense the publication is available for use by all of his wholesaler customers who are in competition with the wholesaler customers who do in fact use it; if it is not so available for use by some customers, the supplier must offer those customers a reasonable alternative."

[31 FR 4448, Mar. 16, 1966]

§ 15.17 Use of descriptions "velvet" and "suede" for a flocked fabric.

(a) A Federal Trade Commission advisory opinion informed a manufacturer that the unmodified terms "velvet" and "suede" could not properly be used to describe a flocked fabric.

(b) The manufacturer had described the material in question as one formed of micro-cut flock fibres upstanding on end and adhered to a suitable backing. The resulting fabric, it was said, has the appearance and feel of velvet and suede.

(c) The Commission believes the consuming public understands the unmodified term "suede" to connote leather and the unmodified term "velvet" to connote, among other things, a particular kind of wrap pile fabric.

(d) The fabric in question, therefore, may properly be designated only as "suede fabric", "suede cloth"; "velvet-like fabric" or "velvet-like cloth" or by words of similar import. The expressions "sueded fabric", "sueded cloth"; "velveted fabric" or "velveted cloth" or words of similar import are also unobjectionable.

[31 FR 4786, Mar. 22, 1966]

§ 15.18 Exclusive franchise arrangements.

(a) A concern proposing to establish a service in principal American cities through exclusive franchises was advised that, with two exceptions, the Federal Trade Commission has no objections to the program as now proposed by its exclusive license agreement.

(b) The first exception involved the contractual provision requiring the licensees to purchase their equipment, supplies and services through a central procurement office operated by the licensor.

(c) "On the facts which you have furnished us, we are not able to make a determination as to the reasonableness" of this requirement, the Commission said. "We cannot determine, for example, which of the various products subject to that clause require such a degree of uniformity as to justify such a central procurement obligation. Similarly, as to those products where uniformity might be necessary, we cannot determine whether it could not be achieved by specifications or by some other less restrictive means than that provided for * * *. Accordingly, we cannot give you any opinion as to the lawfulness or unlawfulness of this provision."

(d) The other exception noted in the advisory opinion concerned the article of the agreement providing that after termination, the licensee may not, for a period of 3 years, and without geographic limitation, engage in business in "similar fields."

(e) The Commission said, "While the duration and geographic scope of this article are, in our view, reasonable, the term 'similar fields' is so general and ambiguous that, unless clarified and reasonably limited, it might impose an unreasonable restraint on the licensee."

(f) The licensor was cautioned by the Commission, "With respect to the agreement as a whole, you should bear in mind that the legality of any franchise system depends to a large extent upon the manner in which such agreements are implemented. If apparently reasonable reservations of rights by the licensor are in practice administered in an unreasonable manner so as to unfairly encroach upon the freedom of the licensees, an agreement which is legal on its face can become illegal in effect."

[31 FR 4833, Mar. 23, 1966]

§ 15.19 Advertising promotions addressed to new mothers.

(a) In an advisory opinion the Federal Trade Commission informed an advertising agency that the plan described below would not violate Commission administered law.

(b) The plan: (1) Having first made arrangements with suppliers, not retailers, an advertising agency proposes to mail new mothers, whose names would be obtained from public sources, an envelope containing a variety of "savings" coupons advertising products such as baby foods, powder, soap, lotions, and the like. By redeeming the coupons at any stocking retail outlet of her choice, the mother would save 5 or 6 cents on a purchase of the advertised product. A line might appear on the cover of the envelope calling attention to the fact that it contains a coupon for an advertiser's product but no part of the mailing would mention the name of, or contain any coupons advertising "house brands" of, any particular outlet at which a coupon might be redeemed.

(2) It is the Commission's view that advertisers participating in such a plan would not specifically, or implicitly, be furnishing promotional assistance to a particular outlet from which the advertiser's products could be obtained by the new mother.

(3) An advertiser in interstate commerce who offers promotional assistance to particular outlets, specifically or implicitly, for his products is required under the laws administered by the Commission to make the offer to each of his competing customers so that the assistance is realistically available to each of them on proportionally equal terms.

[31 FR 4890, Mar. 24, 1966]

§ 15.20 Necessity to disclose foreign origin of strain release device if servomotor is labeled as "Made in U.S."

(a) The Commission has issued an advisory opinion in which it advised a manufacturer that it would be improper to label its servomotors as "Made in U.S." since that would constitute an affirmative representation they were entirely made in this country, which is not the fact, unless the label also discloses in a clear and conspicuous manner that the strain release device is imported from West Germany.

(b) The Commission's opinion was rendered in response to a factual situation where all components of the servomotor, except the strain release device, are of domestic origin. The strain release device is to be imported in an assembled state from West Germany, and it represents approximately 5 percent of the total cost of all the components. The servomotors will be sold in the United States and in foreign countries.

(c) In its opinion the Commission also took the position that the disclosure requirement would also be applicable, even though the manufacturer decided at a later date to import the strain release device unassembled and assemble it here in the United States.

(d) Finally, the Commission's opinion noted that it would have authority to impose the same requirement in connection with the sale of servomotors in foreign countries, provided they were being sold in competition with other American manufacturers.

[31 FR 5069, Mar. 29, 1966]

§ 15.21 "Free" offer of merchandise.

(a) The Federal Trade Commission rendered an advisory opinion on a retailer's proposal to offer a stereo record player for "absolutely nothing" with the purchase of one stereo record a week for fifty weeks.

(b) The concern had asserted that it does not retail the record player by itself for less than $249 and that the records are high quality stereo records which it retails for $4.98 and it does not know of anyone else selling them for less. Thus, it stated, the customer would pay $249 for the record player and the records, which is the price normally paid for the set alone.

(c) The Commission informed the retailer, "Since the matter you have presented is wholly dependent upon the facts, it is difficult to render a categorical opinion. When a seller offers to supply one article 'free,' or 'at no extra cost,' or for 'absolutely nothing' in conjunction with the purchase of another article, he is thereby representing to prospective customers that the article required to be purchased is being sold at no more than the price at which it is usually sold in substantial quantities. You will note that we are not dealing here with abstract evalutions, but rather with concrete selling prices.

(d) "Thus if the records which are to be offered those who accept this offer are currently being sold in substantial quantities for $4.98, there could be no objection to the offer on that score. On the other hand, if such records are what is known in the trade as 'low cost,' 'cut-outs,' 'budget lines,' etc., which normally command a much lower selling price, the offer would be deceptive even though the records may be listed at $4.98 for advertising or preticketing purposes. In that event, instead of purchasing current records at the prevailing market price and receiving a record player at no extra cost, the purchaser would be paying a high, nationally advertisied, price for records worth a fraction of that value, the substantial markup thereby defraying the cost of the record player.

(e) "Although the sample of the promotion letter you furnished contains no representation of the value of the record player, the same general principles would apply if such representations are made. Thus, to avoid any basis for deception, representations of price or value of the record player must reflect the actual or prevailing market price at which sales of that product are currently being made in substantial quantities."

(f) The Commission also noted that the promotion letter states "Have you ever been called 'Lucky'? Well Congratulations" and urges the customer to "come in before the expiration date."

(g) "If, in fact," the advisory opinion commented, "the offer is available to more than a few selected persons, or continues for an extended or indefinite period of time, then the representations in the promotion letter would be false and deceptive."

[31 FR 5069, Mar. 29, 1966]

§ 15.22 Impropriety of description "Made in U.S.A." for kit with substantial amount of foreign components.

(a) An advisory opinion by the Federal Trade Commission notified a marketer of toys that it would not be permissible to use the labeling description "Made in U.S.A." for a tool kit containing two Japanese components.

(b) The kits will contain 20 items, 18 of American origin and 2 imported from Japan which will represent 16 percent of the total value of the entire kit.

(c) The Commission, advised that "the claim, 'Made in U.S.A.' would constitute an affirmative representation that the entire kit was of domestic origin. Since a substantial portion of the components therein would be of foreign origin, the Commission is of the opinion that it would be improper to label the kits as 'Made in U.S.A.' "

[31 FR 5125, Mar. 30, 1966]

§ 15.23 Establishment of buying corporation by broker.

(a) An advisory opinion by the Federal Trade Commission notified a broker-distributor of fresh fruits and vegetables that either of his proposed alternative plans to establish a buying corporation would involve grave risk of illegality.

(b) The businessman had inquired whether or not under the Perishable Agricultural Commodities Act and FTC law he may lawfully:

(1) Establish a corporation as an exclusive buying company for a purchaser for resale, this corporation to buy and be billed in its own name. The purchaser for resale would own one or more shares of the common stock of the buying company and would participate in the brokerage received by that company, or

(2) Establish a corporation as above for the above described purposes, the difference being that shippers would directly invoice and be paid by the purchaser for resale rather than the proposed corporation.

(c) The Commission advised him that it had no comment on the Perishable Agricultural Commodities Act because it does not administer this law.

(d) "The immediately applicable statute is," continued the advisory opinion, "as you know, section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, which makes unlawful the payment or receipt of brokerage or allowances in lieu thereof in certain commercial contexts.

(e) "In the Commission's view, either of the plays you propose, if adopted, would carry with them grave risk that the statute will be violated.

(f) "Absent any indication to the contrary, they appear to amount merely to a means whereby both the letter and the spirit of the statute are to be avoided."

[31 FR 5259, Apr. 1, 1966]

§ 15.24 Food store promotional plan.

(a) An advisory opinion by the Federal Trade Commission informed a company of the "very serious possibility" that a proposed promotional plan would subject participating food supplied advertisers to a charge of law violation.

(b) The plan involved the distribution of reprints of advertisements to the public through retail food store, the cost of the reprints to be shared by participating suppliers. No mention would be made of any specific retailer in the advertising and 10,000,000 reprints would be offered at no cost. Each retailer would receive the number requested provided the total ordered did not exceed this available supply. If the orders exceeded 10,000,000, this number would be divided by the total number of checkstands in stores requesting copies to determine how many each store would receive.

(c) It appears, the FTC's advisory opinion stated, "that no problem would arise under the laws administered by this Commission unless and until the requests for reprints exceed the available supply of 10,000,000. In such event, it is doubtful that the basis chosen for distribution of the reprints among competing retailers would result in the proportional equality required by the law [section 2(e) of the Robinson-Patman Act]. While the Act does not specify any single standard for proportionalizing merchandising services and facilities, it does not appear that the required result will be achieved when the standard selected is the number of checkstands in the stores requesting copies. This standard bears no ascertainable relation to the volume of business which any of the retailers involved might conduct with any of the participating suppliers. In fact, it could result in a situation in which retailers who have a small volume with the participating suppliers would receive more reprints than competing retailers with a much larger volume solely because of a greater number of checkstands. We cannot conclude then that the plan as it is presently proposed would necessarily result in the proportionally equal treatment of all competing customers that the law requires. Consequently, there is a very serious possibility that it would subject the participating suppliers to a charge of violation of section 2(e) of the Robinson-Patman Act.'

[31 FR 5260, Apr. 1, 1966]

§ 15.25 Impropriety of description "14 K" for item not entirely gold.

(a) The Federal Trade Commission rendered an advisory opinion that it is improper to mark or describe an earring as having a "14 K post" when the post is not entirely gold.

(b) "Under Rule 22(c)(1) of the Trade Practice Rules for the Jewelry Industry,"[1] the Commission advised, "an article may not be so designated unless it is 'composed throughout of an alloy of gold'; since this article will contain substantial electroplatings of base metals, it plainly is not composed throughout of gold."

(c) The requesting party had stated that the earring in question would be constructed as follows:

(1) The ornamental front part would be basically brass, but no quality claim is contemplated as to this part of the article.

(2) The front part is attached to a post made for penetration of pierced ears and held in place by a clutch type back made basically of brass. No quality claim for the clutch type back is contemplated.

(3) The post will be 14 karat gold. After being soldered to the ornamental front the entire article will be electroplated with copper, then electroplated with nickel, and finally electroplated with high karat gold.

[31 FR 5287, Apr. 2, 1966]

§ 15.26 Paying advertising allowances based upon certain percentage of purchases from the supplier.

(a) The Commission gave approval to a proposed promotional plan which called for the payment of advertising allowances to all competing customers based upon 5 percent of the customer's annual dollar volume of purchases from the supplier paying the allowance. Its approval was granted after it had pointed out several steps which must be followed in the implementation of the plan.

(b) Under the terms of the plan which is designed to stimulate the sale of couch throws, the customer must place local advertisements promoting the sale of said products before he is entitled to the advertising allowance. Noting that no single way to proportionalize is prescribed by law and that any method which treats competing customers on proportionately equal terms may be utilized, the Commission pointed out that one of the most widely used and acceptable methods is to base the payments on the dollar value of goods purchased during a specified period of time. Since that is precisely what the party requesting the advisory opinion proposes to do, namely, make advertising payments which amount to 5 percent of the customer's annual dollar volume of purchases of couch throws, the Commission gave its approval to the plan.

[31 FR 5551, Apr. 8, 1966]

§ 15.27 Affirmative misrepresentation of domestic origin.

(a) The Commission was requested to advise whether or not it would be permissible to label boxes containing toy sets as "Made in U.S.A." when some of the parts or components inside the box were imported.

(b) The Commission advised that it would not be proper to label these boxes as made in the U.S.A. since that would constitute an affirmative representation that the contents were entirely made in this country, which is not the fact, unless, of course, the label also discloses in a clear and conspicuous manner the fact that certain of the contents are imported.

[31 FR 5551, Apr. 8, 1966]

§ 15.28 Selection of customers by a single trader.

(a) A Commission advisory opinion informed a publisher that no actionable trade restraints appeared to be involved in his proposal to select the customers to whom he will sell a menu and recipe pamphlet.

(b) As explained by the requesting party, the pamphlet will be published weekly and will contain authoritative information on buying, preparing and serving food products. It will be sold to selected food chains operating fewer than 500 retail outlets, whose general trading areas do not overlap. Copies of the pamphlet will be given free to customers of the food chains as a promotional device. The pamphlet will not mention any products by brand name, and will not be available as a medium for advertising by any supplier or association of suppliers, nor will any of them contribute financially towards its publication or distribution.

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[1] 16 CFR 23.22(c)(1).

(c) The Commission pointed out that the antitrust laws do not restrict the right of a seller who does not have monopoly power to select those customers to whom he will sell his product, provided that the right is not exercised for the purpose of monopolization or is otherwise linked to an unlawful course of conduct in restraint of trade.

[31 FR 5660, Apr. 12, 1966]

§ 15.29 Affirmative domestic origin representation on products containing imported components.

(a) An American concern proposing to market shaving brushes containing plastic handles imported from England has been informed by the Federal Trade Commission that it will not be necessary to disclose the English origin of the handles, assuming there is no affirmative representation they are domestic.

(b) The Commission added that its advisory opinion, of course, "does not relieve one from complying with any applicable statutes or regulations administered by the Bureau of Customs."

(c) The company intends to insert and cement the bristle into the imported handles here in the United States. The cost of the completed brush is $2.25 and the cost of the imported handle will be 35 cents.

[31 FR 5660, Apr. 12, 1966]

§ 15.30 Origin disclosure on package for Canadian-made automotive part.

(a) An American concern has been advised of the Federal Trade Commission's disapproval of its proposal to use a modified version of its present cardboard containers to distribute in this country a replacement automotive part to be manufactured in Canada.

(b) The advisory opinion noted that the part will be marked "Made in Canada" but that, under normal conditions, the ultimate purchaser is not likely to observe this marking prior to purchase. On the cardboard container appear the company's American address plus a legend which it proposes to obliterate, "Made in U.S.A."

(c) The Commission's advice was that permanent obliteration of this legend "on the outside of the cardboard containers would not be sufficient since the presence of your company's address on the container may lead many persons to believe that the * * * (products) were manufactured in the United States. Thus it would also be necessary to disclose the Canadian origin on the container in a clear and conspicuous manner."

[31 FR 5687, Apr. 13, 1966]

§ 15.31 Rebate pricing plan.

(a) The Commission informed a photoengraving company that its proposed rebate pricing plan granting a 10-percent discount to all purchasers to whom it provides photoengraved plates through advertising agencies will not violate section 2(a) of the amended Clayton Act.

(b) As it understands the plan, the Commission said, the concern will offer a direct year-end across-the-board rebate of 10 percent of the dollar value of purchases of photoengraved plates to all purchasers to whom it provides photoengraved plates through advertising agencies. The rebate is to be contingent upon the advertisers specifying the use of the engraver's facilities to their respective advertising agencies. The concern will provide photoengraved plates to the extent of its facilities to all purchasers classified as buying photoengraved plates through advertising agencies, and will affirmatively disclose and offer this rebate to all customers and prospective customers in this classification.

[31 FR 5687, Apr. 13, 1966]

§ 15.32 Advertising by manufacturer planning to make both wholesale and direct mail sales.

(a) The Federal Trade Commission has made public an advisory opinion on whether a supplier selling by direct mail, to a retail chain and to individual retailers, all of whom are located 10 or more miles from any chain outlet, may properly feature only his own direct mail operations and his chain customer in his national advertising.

(b) The applicant specifically queried as to whether or not the 10 miles or more distance between the individual retailers and the chain outlets negates the possibility of competition between them.

(c) "As a general rule," the Commission said, "a supplier's ordinary unilateral advertising expenditures are not subject to the Clayton Act, as amended by the Robinson-Patman Act. In consequence, a supplier's advertising which makes clear the direct mail availability of a particular item through the supplier, without more, would raise no questions under the Act.

(d) "Whether or not the chain outlets and the other retailers supplied are competitive, however, is a matter of fact to be determined by the facts. A particular distance between them is not determinative of whether they do or do not compete. If they in fact compete then under the statute the advantages to be accrued from the supplier's advertising program, if accorded at all, must be proportionally accorded. If they do not in fact compete, then otherwise."

(e) Under the circumstances, the Commission concluded, "it is not practicable" to answer that part of the applicant's question dealing with mention of chain store availability in his national advertising.

[31 FR 5826, Apr. 15, 1966]

§ 15.33 Affirmative misrepresentation of domestic origin.

(a) The Federal Trade Commission has rendered an advisory opinion that it would not be permissible to label dental X-ray film as "Made in U.S.A." if it consists in part of a raw safety base film imported from a foreign country, the remaining ingredients to be made in the United States.

(b) The Commission's advice was that the imported raw safety base film "is the principal and essential component of the finished product. Without it there can be no X-ray picture." The manufacturing and packaging processes described in the letter from the requesting party "would not change the basic structure or composition of the imported film to such an extent that its identity would be lost. It is concluded, therefore, that it would not be proper under section 5 of the Federal Trade Commission Act to label the dental X-ray film as 'Made in U.S.A.' "

[31 FR 5826, Apr. 15, 1966]

§ 15.34 Promotional assistance: use of sales message announcing device in retail stores.

(a) In an advisory opinion the Federal Trade Commission gave qualified clearance to the proposal by a manufacturer of an electronic device to offer selected manufacturers an opportunity to present a sales message to the public in retail stores by means of the device.

(b) The proposed plan provides that any manufacturer contracting for use of this device will supply its manufacturer with a list of all retailers of his products in a geographic area to be selected by him. The device producer, upon receiving such list, will within a reasonable time effectively offer all retailers located in the selected geographic area an opportunity to avail themselves of the use of the electronic device at equal rates determined by the number of units to be installed in a particular location.

(c) The advisory opinion called attention to the admonition in the FTC's Guides for Advertising Allowances that a seller must be careful not to discriminate against customers located on the fringes but outside the area selected for the special promotion, since they may be actually competing with those participating.

(d) With this caveat, the Commission advised, "the above-outlined plan will not offend section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act. * * * Since under the facts available to us we have no way of knowing whether or not fringe area competing customers will exist in the actual operation of your proposed plan we expressly exclude this point from our opinion that your proposed plan is unobjectionable.”

[31 FR 6262, Apr. 23, 1966]

§ 15.35 Promotional plan in selected areas.

(a) A sales promotion company has been advised by the Federal Trade Commission that with one reservation its proposed promotional plan is not violative of law.

(b) Under the plan, the promoter will sell to food processors booklets containing recipes featuring the processors' products together with additional promotional and advertising materials. The promoter will directly or indirectly give all food retailers within a selected geographic area an effective opportunity to obtain a continuing supply of such booklets plus file boxes and a display rack at what amounts to administrative costs.

(c) “With one reservation,” the FTC's advisory opinion stated, “the plan does not appear to offend the provisions of section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act. From the facts presented, however, it is impossible to determine the nature and extent of the competition, if any, which may exist between retailers close to, but on different sides of, the boundaries of the selected geographic area. As to this particular point therefore, we withhold our opinion.”

(d) Noting that the plan may be extended to manufacturers of household and housekeeping items other than food, the Commission said it is impracticable to provide an opinion on this point because “the nature, importance and extent of competition between food retailers and nonfood retailers selling the same items is unknown to us and cannot readily be ascertained.”

[31 FR 6263, Apr. 23, 1966]

§ 15.36 Functional discounts, meeting competition.

The Commission answered inquiries from a manufacturer of items used in the automotive, trucking and marine trades regarding functional discounts and meeting competition. The Commission advised the inquirer that:

(a) It may sell to fleet truck operators at regular jobber prices, but that competing truck fleet operators must be accorded nondiscriminatory treatment.

(b) It might establish a “specialized” classification for jobbers selling to fleet operators—entitling such jobbers to discounts which the manufacturer's distributors are afforded—but that it may not discriminate against any of its other resale customers which compete with the “specialized” jobbers.

(c) It could offer such discounts to meet the lawful price of a competitor provided the offer is in response to an individual competitive situation rather than in response to a pricing system.

[31 FR 6300, Apr. 26, 1966]

§ 15.37 Affirmative misrepresentation of domestic origin.

(a) The Commission was requested to advise whether or not it would be permissible to describe as “Made in U.S.A.” imported black angle iron which had been cleaned in this country and then galvanized to required specifications by means of submerging in hot molten zinc, the finished product to be known as galvanized angle iron.

(b) The Commission advised that it would not be proper to describe the finished galvanized angle iron as “Made in U.S.A.” since that would constitute an affirmative representation that the entire product was made in this country, which is not the fact, unless, of course, the fact is also disclosed in a clear and conspicuous manner that the black angle iron is imported.

[31 FR 6410, Apr. 28, 1966]

§ 15.38 Promotional allowance program.

(a) The Federal Trade Commission advised a men's clothing manufacturer that a proposed two-part promotional allowance program "would satisfy the requirements of the law," but that a subsequently proposed modification of one part of the plan "would be clearly illegal."

(b) Under one part of the originally proposed plan—participation in cooperative advertising allowances—the manufacturer would offer an advertising allowance of 2 percent of net sales at regular prices up to a maximum of 50 percent of the actual cost of advertising its products in newspapers, magazines and other printed media. New accounts and customers of less than 1 year would be offered the same allowance based upon their first quarter's purchases. If this offer is made known and offered to all competing customers, the Commission said, this part of the plan would not violate the law.

(c) Under the other part of the plan—participation in sales or promotions—the manufacturer would make available to all customers a total of 20 percent of their net purchases of basic products at regular prices at a special reduced price of $4.00 off the net price, which the customer may accept at one time or in two installments during the year for sales in January and/or June. In other words, if a customer purchased $1,000 worth of such products during the year at regular prices, he would be entitled to purchase 20 percent or $200 worth of this product at the stated reduction for sales purposes during January and/or June. Likewise, this would not violate the law, the Commission said.

(d) However, subsequent to Commission approval of the plan, the manufacturer proposed a modification of its cooperative advertising program. The concern proposed to increase its advertising payments by offering a 3 percent allowance to accounts whose yearly volume is $50,000 minimum, a 4 percent allowance to accounts whose yearly volume is $75,000 minimum and 5 percent to those whose yearly volume is $100,000 and over. To receive the increased payment, the customer would have to match the allowance and use either the manufacturer's label or that label in combination.

(e) The Commission said that "under no circumstances can a program which pays a higher percentage to larger volume buyers when buyers in smaller quantities receive smaller percentage of net sales be held to meet the proportionally equal requirement of section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act. Substantially identical programs have previously been held illegal."

[31 FR 6490, Apr. 29, 1966]

§ 15.39 Cooperative advertising program.

(a) The Federal Trade Commission advised a manufacturer of women's wear that its proposed cooperative advertising allowance program and a furnishing of services or facilities, "if in practice worked out as presented, would be unobjectionable under sections 2(d) and (e) of the Clayton Act, as amended by the Robinson-Patman Act."

(b) Under the supplier's first offer, all vendees (who are to be effectively informed of the offer) will be paid, on request and on proof made, for one-half their cost of cooperative advertising. Supplier's contribution at any one time will be limited to, and will amount to, 10 percent of the dollar value of a single sale to a requesting vendee. Over a year's time, however, supplier's contribution is to be restricted to 2.5 percent of the dollar value of a vendee's annual purchases. Any vendee who has received in excess of this amount will be billed therefor and a refund will be required.

(c) The Commission cautioned the manufacturer, however, "that should one or more, but not all, competing vendees fail to refund an excess allowance as determined by your plan, Robinson-Patman Act questions would arise."

(d) Under supplier's second offer, statement enclosures will be provided, the number furnished being based on the number of items purchased by a vendee. Enclosures will be imprinted for those entitled to quantities of 5,000 or more; unimprinted enclosures will be furnished to those entitled to fewer than 5,000 enclosures.

[31 FR 6546, Apr. 30, 1966]

§ 15.40 Sales promotion plan a lottery.

(a) The Federal Trade Commission advised a processor of a grocery item that its proposed sales promotion plan would constitute a lottery and its use would be actionable under section 5 of the FTC Act.

(b) Under the plan, the concern proposed to insert at random either certificates of no value or of varying redeemable cash values in containers of its product to be sold at retail. At the time of retail sale, equivalent certificates in equal proportions would be made available at wholesale distributors to the general public without cost or obligation.

(c) The Commission said that "In our view the existence of the free certificates will not cure the difficulty presented by the transactions at the retail level which, standing alone, clearly involve a lottery in the sale of merchandise of a kind often heretofore made subject to a Commission order."

[31 FR 6547, Apr. 30, 1966]

§ 15.41 Additional discount to mail order seller of paperback books.

(a) A seller of paperback books planning to obtain additional discounts from publishers for selling through a mail order catalogue has been advised of the possible law violations involved in the plan and that the Federal Trade Commission is unable to give him an unqualified opinion on its legality.

(b) The Commission pointed out that any plan which results in discriminations in price or allowances between different resellers immediately raises problems of possible violation of the Robinson-Patman Act, and that on the basis of the information supplied, there appear to be two possible ways of viewing this plan.

(c) Firstly, the Commission said, "If the plan involves simply the granting by the publishers of a lower price to you than to their other customers, its legality from the publishers' point of view would be governed by section 2(a) of the Robinson-Patman Act which prohibits discriminations in price which may adversely affect competition. In spite of the fact that your sales would not be made through the same channels of distribution as those of other purchasers of paperback books, it seems likely that you would nevertheless compete with these purchasers to some extent, and that this competition might be lessened by the proposed price discriminations, in violation of section 2(a). Although price discriminations otherwise unlawful under section 2(a) may be justified by cost savings on the part of the seller, the information which you have submitted does not indicate the presence of such "cost justification" in your plan. If the discounts granted to you by sellers should violate section 2(a), your knowing inducement or receipt of such discriminations would also violate section 2(f) of the Act.

(d) Continuing, the Commission said the problem would be somewhat different if the discounts granted to the requesting party were considered as promotional or advertising allowances for his listing of the publishers' books in his catalog.

(e) Granting or receiving such allowances would be unlawful "if they were not made available on proportionally equal terms to competing customers," the Commission advised. "Thus, if your suppliers of paperback goods granted proportional advertising or promotional allowances or facilities, such as cooperative advertising allowances, display racks, and the like, to their other purchasers, their granting to you of an allowance for the listing of their books in your catalog would not be unlawful."

[31 FR 6866, May 10, 1966]

§ 15.42 Advertising service disclosing where manufacturers' products are sold.

(a) The Federal Trade Commission made public its advise that a plan to furnish manufacturers a new form of advertising service disclosing where their products are sold would be illegal.

(b) Under this proposed plan, a manufacturer will publish an advertisement in a national magazine, and will furnish to the proposed corporation represented by the requesting party a complete listing of all retailers selling the advertised product, classified according to the major shopping areas throughout the country. The advertisement will contain a descriptive symbol for the proposed service, with a reference to the page in the same publication containing a telephone number list, also classified according to the major shopping areas throughout the country. Each answering service included in this list will be equipped by the proposed corporation with the manufacturer's list of his retailers in that trade area, which will be given to any consumer who reads the advertisement and calls the number provided to learn where he can purchase the product. The cost of the entire service will be borne by the manufacturer.

(c) The FTC's advisory opinion said, "Since it appears that any potential customer calling will be furnished with the names and addresses of all dealers handling a particular product in a trade area, it is our opinion that the proposed plan described would not subject participating manufacturers or your client to a charge of violating the law. We should caution, however, that great care must be exercised in defining the boundaries of the various trade areas into which the country is to be divided so as not to discriminate against customers located on the fringes but outside the area served by the answering service, since they may be in actual competition with those who are within the area and thus receive the benefit of the service."

[31 FR 6866, May 10, 1966]

§ 15.43 Goods of like grade and quality.

The Federal Trade Commission advised a manufacturer producing iron castings to special order of its customers that such goods are not of like grade and quality within the meaning of that section of the amended Clayton Act prohibiting price discriminations. The Commission was informed by the manufacturer that:

(a) Its castings are produced in accordance with individual customer specifications;

(b) It submits samples to the customer for approval;

(c) The customer further processes the casting prior to use; and

(d) Castings are not shipped off the shelf but are produced to order with several weeks lead time.

[31 FR 6906, May 11, 1966]

§ 15.44 Agreement among retailers for uniform store hours.

(a) A retail dealers association of a certain city of substantial size has been advised that a proposed agreement among downtown retailers to establish uniform store hours would not, under the circumstances presented, be in violation of any laws administered by the Federal Trade Commission.

(b) The stated existing downtown shopping hours are 9 a.m. to 5:30 p.m. with Monday and some Thursday hours from 9 a.m. to 9 p.m. The proposed change would make the hours from 11 a.m. to 8 p.m. weekdays and 9 a.m. to 5:30 p.m. on Saturday.

(c) The basic reason advanced for the proposed change in hours is to place the downtown retailers in a more effective competitive position with suburban shopping centers by establishing more convenient shopping hours for office workers and by enabling spouses to meet for dinner and shop. Any business establishment will have the free choice as to whether or not to conform to the proposed change in shopping hours.

[31 FR 6906, May 11, 1966]

§ 15.45 Merchandising by means of a chance or gaming device.

(a) The Commission was recently requested to furnish an advisory opinion with respect to a proposal to distribute prizes to users of trading stamp books. Under this proposal, distributors of trading stamps would receive from the stamp company not only the trading stamps that are to be pasted in the books but the books as well. The books would bear a seal which when broken after the book is completely filled and presented to the store manager would reveal a prize ranging from $1.50 to $100. Books carrying prizes larger than $1.50 would represent approximately 10 percent of the total books distributed. The stamp user would also have the option of not breaking the seal and receiving $2 in cash or $2.15 in merchandise.

(b) It was contended that of the three essential elements of a lottery, namely, consideration, chance and prize, the first would be missing since merchants would distribute the stamps not only to their customers in proportion to purchases made, as is normal for trading stamp operations, but also to anyone who would register in the merchant's store whether a purchase was made or not. Extensive advertising would inform the general public that they may receive 80 stamps per week by just registering with the merchants without the necessity of making a purchase.

(c) The Commission advised that it did not need to decide the question of whether or not consideration would exist, so that the proposal could be held to constitute a technical lottery, for it was still of the view that the plan would involve an illegal effort to sell or dispose of merchandise by means of a chance or gaming device. In the Commission's view, lotteries are not the only method by which the public gambling instinct may be aroused, for other methods are comprehended within the general concept of merchandising by gambling. This proposal appeared to fall into that category, for even though each participant would always receive something of value if he persisted long enough to fill the book with stamps, the amount of his return would vary greatly with his willingness to "take a chance." Consequently, the Commission declined to give its approval to the proposed plan.

[31 FR 7225, May 18, 1966]

§ 15.46 Common sales agency.

(a) The Commission has advised a manufacturers' agent that its proposed plan to be the sales agent for a number of producers of the same product involves grave risk of illegality because one of its stated objectives is market stabilization.

(b) "The mere use of a common sales agency will not, in and of itself, result in a violation of law," the FTC's advisory opinion stated. However, it continued, in view of the requesting party's statement that one of the plan's purposes is to stabilize the market, "it is reasonable to conclude that the use of a common marketing agency by a number of different producers of the same product would inevitably lead to a violation of the Federal Trade Commission Act as well as the Sherman Act. This is especially true when the common agent would be quoting a common price for all the producers he represents."

(c) The Commission pointed out it is common experience that any arrangement aimed at stabilizing the market, "even if not initially so designed, has within it the seeds of price fixing allocation of markets, or restriction of production, all of which are classic antitrust violations."

[31 FR 7225, May 18, 1966]

§ 15.47 Leather terms may not be used for nonleather gloves even if true composition is disclosed—manner and place of disclosing foreign origin.

(a) The Federal Trade Commission has made public its advice to a marketer of gloves that it would be improper to use a leather-connoting description for gloves which in fact contain no leather, even though qualifying language is used to describe their true composition.

(b) Noting that the gloves are to be imported from Japan and the requesting party intends to disclose their origin on the paper bands and box labels, the Commission further advised that to avoid possible deception, disclosure of the Japanese origin must also be made on each pair of gloves by marking or stamping or on a label or tag affixed thereto. This disclosure must be readily visible upon casual inspection of the gloves and of such permanence as to remain on them until consummation of sale to the ultimate purchaser.

[31 FR 7281, May 19, 1966]

§ 15.48 Legality of licensee and sublicensee selling to competing jobbers.

(a) An exclusive licensee of a patented article has requested advice from the Federal Trade Commission concerning the legality of his sales and those of a manufacturing sublicensee to competing jobbers.

(b) The licensee proposed to sublicense a manufacturer to produce the article and sell it to its own jobbers. At the same time, the licensee, on his own account, would sell the same article under a different name to his own jobbers. The sublicensee manufacturer would ship direct to customers of the licensee, some of which may be in competition with its own jobbers, and bill the licensee at an agreed price.

(c) The Commission advised that in general, the Robinson-Patman Act "does not apply unless there is a discrimination attributable to the same seller in dealing with different purchasers."

(d) Consequently, it said, if the manufacturer, a separate business entity, has and exercises sole and independent control over the prices at which it sells and the licensee has and exercises sole and independent control over the prices at which he sells, "questions cannot well arise under section 2(a) of the Robinson-Patman Act."

(e) However, the Commission pointed out that on the basis of the facts available it is unable to say that the plan "would not violate any of the trade regulation laws. For example, we do not know what, if any, price agreements are contemplated between * * * [the licensee] and the manufacturer or the nature thereof or whether such agreements may hereafter come into being."

[31 FR 7281, May 19, 1966]

§ 15.49 Cooperative advertising plan with no ceiling on suppliers' payments.

(a) A retail merchant has been advised by the Federal Trade Commission that its proposed standard cooperative advertising agreement with its suppliers is not objectionable.

(b) The contemplated agreement states that the supplier: (1) Agrees to pay a fixed percentage of the requesting retailer's cost of advertising and (2) is offering proportionally equal allowances to the retailer's competitors.

(c) The Commission noted that the plan provides for promotional payments without limitation as to amount and that it is more customary for suppliers to limit their obligation by a percentage of a dealer's purchases.

(d) "However this might be," the advisory opinion said, "the Commission has concluded that no objection will be raised if suppliers decide to eliminate * * * [this] limitation and undertake to pay a stated percentage of all the advertising conducted by their dealers. This presupposes, of course, that the suppliers will make the same offer available to all competing customers and that the offer is functionally usable by all competing customers."

(e) The plan, the advisory opinion added, "does contain features which might conceivably be used to greater advantage by larger retailers. But these prospects appear so remote, the Commission is not inclined to object unless and until future experience should produce presently unexpected evidence that some customers actually received favored treatment. Objection then would be taken only after proper and adequate notice that the plan had not developed as anticipated."

[31 FR 7349, May 20, 1966]

§ 15.50 Furnishing and servicing projection equipment in grocery outlets.

(a) A marketer of projection equipment has been advised by the Federal Trade Commission that his proposed plan to lease equipment and furnish associated services to suppliers of grocery products for advertising purposes in grocery outlets would not subject him to a charge of violation of law.

(b) Suppliers would lease space from grocery store operator-customers they select. The marketer would prepare advertising of the supplier's product and install and maintain the equipment in the selected stores. He would take no part in the selection of retail stores and would not act as agent or intermediary for the suppliers in making the necessary contracts or agreements for the placement of leased projection equipment in the stores.

(c) The Commission advised the marketer that his leasing of the projection equipment plus the preparation of advertising material and performance of installation and maintenance services would not subject him "to a charge of violation of sections 2(d) or (e) of the Robinson-Patman Amendment to the Clayton Act, which sections are set forth in the Commission's Guides for Advertising Allowances."

(d) However, the Commission said that it "should be clearly understood * * * that participation in this plan by suppliers may involve a violation of law on their part unless the payments made and the services or facilities furnished, are made available to all competing purchasers in a nondiscriminatory manner."

[31 FR 7349, May 20, 1966]

§ 15.51 Discount stamp advertising plan.

(a) The Federal Trade Commission has advised that a proposed promotional plan involving the use of discount stamps would not be illegal if properly implemented.

(b) The requesting party proposes to issue a set of stamps to customers in grocery stores and other types of retail outlets in certain trading areas. The stamps will feature particular brands of products. When forwarded affixed to labels, wrappers or boxtops of the products featured, the requester will send a check to the customer in an amount equal to 10 cents for each stamp plus 10 cents additional if an entire set has been forwarded.

(c) Suppliers of products featured would pay the requester for managing the promotion. Grocery store and other operators of retail outlets competing in and on the fringes of the trading areas in which the plan is attempted would be offered the opportunity to participate. To this end, such retail outlet operators would be furnished the stamps, promotional kits and money allowances on the basis of their annual dollar volume of sales.

(d) The advisory opinion said it is the Commission's understanding that although the requesting party would concentrate its promotional efforts on operators of grocery stores it would also offer the plan to operators of other types of retail outlets competing in the sale of the products of supplier-advertiser-participants in the promotion and would admonish all such supplier-advertiser-participants of their responsibility to accord proportionally equal treatment to all of their competing customers whether engaged in grocery retailing or other fields. The Commission further assumed that the proposed notices would adequately inform all prospective participants of all details of the offer.

(e) The Commission advised that its opinion is that "implementation of the plan as outlined would not be violative of sections 2(d) or (e) of the Robinson-Patman Amendment to the Clayton Act."

[31 FR 7737, June 1, 1966]

§ 15.52 Food manufacturer, retailer promotion program.

(a) In an advisory opinion the Federal Trade Commission informed a promotional concern that its proposed advertising program to be utilized by food manufacturers and retailers would not be in violation of existing law if the program is modified to take into account "exceptions and caveats" pointed out the Commission.

(b) The promoter proposed to design a number of aisle-end displays, each promoting the name of a food manufacturer and a seasonal recipe incorporating a product of that manufacturer. Displays for twelve participating manufacturers and decorative material would be packaged in a kit (which may be divided into 12 segments) for distribution to retail stores taking part in the program.

(c) According to the plan, each manufacturer would pay a proportionate share of the cost of the program, retailers would bear none of the cost but must agree to provide aisle ends for displays and stack the manufacturers' products, and the number of kits each retailer would receive would be determined by the number of retail stores each owns.

(d) The Commission advised the promoter, among other things, that if all retailers sell the products of all the manufacturers and all can use the entire kit, he would not be required to break down the kit just because a particular retailer so desired. However, the Commission said, if there are certain customers who do not sell the products of all the manufacturers or who cannot, because of space limitations, use the entire kit, then the law would be violated if the promoter insists the retailer take the entire kit or nothing.

(e) After pointing out the requirements concerning notice to all competing customers that the plan is available, the Commission said participating manufacturers would not be obligated to meet the demands for cash by retailers, who could utilize the program, simply because they refuse the kit or sell products of only one manufacturer.

(f) As to manufacturers requiring signed agreements from retailers who wish to receive the kits, the Commission advised that the law permits manufacturers to require that dealers who are to receive the benefit of such promotions must agree to reasonable display requirements so that the purposes of the promotion may be carried out. However, it noted, retailers desiring less than the full kit could not be expected to sign an agreement which would require them to accept the full display kits.

(g) Concerning a manufacturer limiting the program to only one of his products and his responsibility to retailers who handle his products only on a "sporadic basis," the Commission said the law imposes no requirement that a seller must give advertising allowances or services on all his products if he elects to accord them on one or more articles. Problems concerning products of like grade and quality which differ in only minor respects or trade names can be avoided if the suppliers include entire product lines and thus avoid fine distinctions between products. As to the second query, the Commission stated that it would not be safe to exclude any retailer who was in fact a customer of one or more of the manufacturers during the course of this promotion.

(h) The Commission pointed out that if there are some grocery outlets which are too small to use the entire kit—or that part of it which represents all the manufacturers with whom they do business—because of actual space limitations, then some alternative must be provided to keep the plan from being one which is tailored primarily for larger retailers. If the plan results in any of the manufacturers furnishing facilities to some customers which are not readily usable by others, the suppliers are likely to find themselves in violation of the law. By furnishing an alternative method of participation to the smaller customers, such as posters and counter displays, this result can be avoided, the Commission advised.

[31 FR 7737, June 1, 1966]

§ 15.53 Self-locating shopping guide promotional program.

(a) The Federal Trade Commission has advised a sales promotion company that its proposed plan, to furnish self-locating shopping guides to wholesalers for redistribution to their competing retail customers, would not be objectionable provided that smaller retailers are able to obtain proportionally equal treatment.

(b) The Commission noted that some of the aspects of the plan are of interest only to relatively large retailers, and that it appears likely that some, at least, of a participating wholesaler's competing customers may be quite small retailers for whom the proposed plan would have little practical value.

(c) The Commission advised that the "statute requires that any services or facilities made available to the larger of two competing customers must be made proportionally available to the smaller."

(d) Assuming the existence of small competing customers, the Commission said, "it appears clear that if [the] plan is to conform to statutory requirements some provisions should be included therein which would provide for the needs of the smaller customers."

[31 FR 7806, June 2, 1966]

§ 15.54 Promotional assistance; newsstand display.

(a) The Federal Trade Commission rendered to the publisher of a magazine a favorable advisory opinion regarding his promotional assistance plan providing basically for payments of 99 cents per issue, per newsstand and alternatively, at the newsstand operator's option, payment at a rate of one-half cent per copy sold, per issue. Payments would be subject to a $75 maximum per issue to any single newsstand operator. Payments would be made quarterly provided the operator had reported daily sales and permanently displayed the magazine in a high traffic location full cover exposed within easy reach of customers. The plan would be offered each calendar quarter by a notice on the magazine's cover with details printed on an inside page.

(b) Plans such as this come within the purview of section 2(d) of the Robinson-Patman amendment to the Clayton Act. Section 2(d) provides in essence that it is unlawful for a supplier in interstate commerce to offer promotional assistance to his reselling customer unless a proportionally equal offer also is made to the customer's competitors who sell the same product.

(c) The Commission's Guides for Advertising Allowances discuss the requirements for such promotional assistance plans in considerable detail and will be of assistance to persons contemplating their use.

[31 FR 8233, June 11, 1966]

§ 15.55 Dissemination of uniform warranty plans by trade association to its members.

In an advisory opinion the Federal Trade Commission informed a trade association of manufacturers that its dissemination to members of a bulletin outlining two warranty plans and encouraging each member to adopt its own individual warranty would not be violative of any laws administered by the Commission, provided the association uses no coercion for the adoption of either plan.

[31 FR 8233, June 11, 1966]

§ 15.56 Legality of plan to display signs at newsstands calling attention to advertisements in magazines.

(a) An advisory opinion by the Federal Trade Commission informed an advertising company that its plan for display on newsstands of signs relating to specific magazine advertisements will not subject the company itself or participants to adverse action by the Commission, if the plan is carried out as outlined in this section.

(b) It is proposed that the requesting company will arrange for the display of advertising promotional signs directly below or adjacent to copies of magazines on newsstands in high traffic areas, which will remain on the newsstand for the same period of time as the magazine. This sign will direct attention to an advertisement which appears in the magazine in question. The cost of the signs will be borne by the manufacturer or seller of the product advertised, who will also assume the cost of rental payments to the operators of the newsstands for the display of the signs. All payments are to be made through the requesting company, which will act as an intermediary between the advertisers and the newsstands. All signs will be of a uniform 3½ inches in height and of the same width as the magazine involved.

(c) It is understood, the Commission advised the requesting party, "that there will be no business relationship, direct or indirect, between you and the magazines involved, other than may be necessary to secure permission to refer to the magazines in your signs; it is further understood that you in no way participate in any price concessions, direct or indirect, made to your advertisers by the magazines as a result of your program."

[31 FR 8403, June 16, 1966]

§ 15.57 Sales promotion plan disapproved—lottery.

(a) An advertising company has been informed by the Federal Trade Commission that implementation of its proposed sales promotion plan would result in several law violations.

(b) The requesting party explained it would sell paper bags to retail grocery outlets for use in bagging customers' purchases. There would be no variation in price between customers purchasing the same quantity; however, purchase of different quantities would result in different prices. The bags would have advertising of products sold in the store, plus a serial number, printed on them. A drawing would be held periodically and the holder of the "lucky number" would win a prize. Advertiser-suppliers would pay the requesting company for the advertising and it would make the bags available to any grocery operator wishing to purchase them. Grocery store operators would provide the bags free to customers.

(c) In its advisory opinion the Commission raised the following objections to the plan:

(1) The fact is that competing purchasers of different quantities of the bags would be paying varying prices apparently arrived at on the sole basis of the quantity purchased rather than on differences in the cost of manufacture, sale or delivery of the bags. Unless the differences were cost or otherwise justified it is likely that implementation of the plan would be violative of section 2(a) of the amended Clayton Act.

(2) Advertiser-suppliers would be furnishing a service or facility within the meaning of section 2(e) of the same statute to those of their customers purchasing bags from the requesting party, and thus would be under an obligation to provide customers which compete with those buying the bags with a realistically available alternative. "The feasibility of participating advertiser-suppliers fulfilling this requirement is believed remote."

(3) The "lucky number" feature of the plan would constitute a lottery, since consideration (the customer's patronage), chance (the periodic drawing) and prize (the reward to the "lucky number" holder), make up all the essential elements of a lottery; hence an unfair trade practice violating section 5 of the FTC Act.

[31 FR 8403, June 16, 1966]

§ 15.58 Foreign origin—toy balloons.

(a) The Commission was requested to furnish an advisory opinion concerning the labeling as to origin of toy balloons mounted on display cards. The balloons were to be imported from England mounted on 8- by 16-inch display cards, with either 36 or 72 balloons to a card, which will sell for 5 cents or 10 cents per balloon. The card is to be clearly marked as "Made in England," but the individual balloons will not be so marked.

(b) The Commission advised that if the display card is clearly marked "Made in England," no real purpose would be served by requiring each individual balloon to be similarly marked so long as the balloons are not removed from the card prior to sale.

[31 FR 8492, June 17, 1966]

§ 15.59 Disapproval of private group advertising review board.

(a) The Federal Trade Commission announced an advisory opinion disapproving a proposed private group advertising review board to control advertising practices in a particular locality.

(b) The requesting party stated that the review board is to consist of not more than 20 representatives of business and trade groups in the area, and its function is to consider complaints of violations of advertising standards established by the organization representing such business and trade groups.

(c) Hearings on such complaints are proposed to be held by a panel of seven or more members of the review board, none of whom shall be in direct competition with the advertiser. This procedure is to be invoked only after other efforts to correct the practice have been exhausted. Decisions on the merits of each case will be made by the panel and shall be considered as setting precedent for succeeding panels. Where an advertiser has been cited by a panel for violating the standards and fails to comply within a specified time, a letter is to be sent to local media requesting them to require the advertiser to comply with the decisions of the panel.

(d) Although expressing sympathy with the laudable motives of the requesting party, the Commission advised that "approval cannot be given the proposed Advertising Review Board in its present form. Long ago the courts recognized that voluntary action to end abuses and to foster fair competitive opportunities were in the public interest and could be even more effective than legal processes. However, the law has also long recognized that this right of businessmen to police themselves is not without limitations and is certainly not a license for private groups to employ illegal methods in the pursuit of desirable objectives."

(e) The Commission pointed out that "absolute regulation of all advertising practices down to and including the determination of individual rights and the imposition of a penalty in the form of interference with the individual's right to advertise * * * is the ultimate authority which can only be exercised pursuant to legislative grant and subject to proper judicial review.

(f) "Were a private group to assert this power for itself it would mean that the judicial process of interpretation and enforcement would be carried on without the carefully developed safeguards which the law normally imposes upon the process. Unlike the government agency and the courts, the only restrictions private bodies are subject to are those restrictions they see fit to impose upon themselves."

[31 FR 8492, June 17, 1966]

§ 15.60 Advertising of diamonds as "clear, pure color".

The Federal Trade Commission has advised a jewelry firm proposing to advertise diamonds as "clear, pure color" that a substantial segment of the purchasing public would understand the claim to mean a top grade white (or colorless) diamond, and that it should not be used to describe a diamond which shows any color when viewed under normal, north daylight or its equivalent.

[31 FR 8521, June 18, 1966]

§ 15.61 Improper use of terms such as "gold filled" or "rolled gold plate".

(a) The Federal Trade Commission has informed a marketer of jewelry that it would be improper to use terms such as "gold filled" or "rolled gold plate" in describing gold filled jewelry articles which are electroplated with nickel and finished with either gold flash or gold electroplate.

(b) The Commission said that a purchaser of such an article would not get the type of performance expected from gold filled articles because points of wear would expose the coating of white nickel at a very early stage and the ornamental value would be seriously reduced.

(c) "Being electroplated with nickel," the Commission said, the "gold filled material would not serve its function and a person buying the article on that basis would not get what he had been led to believe he was getting. In fact, Rule 22(b)(4) of the Trade Practice Rules for the Jewelry Industry specifically contemplates that the surface coating, not the inner portion, be made of 'gold filled' or 'rolled gold plate'."

[31 FR 8521, June 18, 1966]

§ 15.62 Suppliers and grocery chain exhibition, in-store promotion.

(a) The landlord of an exhibition building has been advised by the Federal Trade Commission that a proposed promotional plan in which suppliers and a grocery chain would lease exhibition display space with the chain also providing in-store promotion of suppliers' displayed products would probably result in violation of Commission administered statutes.

(b) According to the proposed plan, part of the exhibit in the building would be displays provided and maintained by manufacturers, processors, and distributors of food products and grocery store items. These exhibitors, the suppliers, may give away samples, take orders for "off premise" delivery, and sell at retail. The grocery chain's contract with the landlord would provide that the chain would conduct 1-week, chain-wide, in-store promotions of the exhibitors' products; that exhibitors may be required to furnish the chain with materials for the promotion, that the landlord and the chain would cooperate in setting up the exhibitors' displays; and that the chain would have the right to approve only exhibitors whose products are sold in its stores.

(c) The Commission advised the landlord that implementation of the plan probably would result in violation of sections 2 (d) and (e) of the Robinson-Patman Amendment to the Clayton Act and section 5 of the FTC Act unless promotional payments or services were made available to the exhibitor-suppliers' competing customers on proportionally equal terms.

(d) The 2 (d) and (e) aspects, the Commission said, stem from the fact that exhibitor-suppliers would be vulnerable to a charge that they were illegally discriminating between their customers in according promotional benefits. The section 5 aspects involve questions as to whether the chain and the landlord would be inducing a violation of section 2(d) by participating exhibitor-suppliers.

[31 FR 8585, June 21, 1966]

§ 15.63 Disclosure of terms and conditions in guarantee advertising.

(a) A television station has been advised by the Federal Trade Commission that it would be improper in commercials it produces for local automobile dealers to mention the manufacturer's guarantee but to refer viewers to the manufacturer's national advertising for a description of the guarantee's terms.

(b) "In brief," the Commission's advisory opinion stated, "the law requires that when a guarantee is mentioned in the advertising of a product all the material terms and conditions of the guarantee must be clearly and conspicuously disclosed in the same advertisement. The objective is to avoid the possibility of a reader or hearer being misled by concluding, erroneously, that the guarantee is broader or affords more protection than is in fact the case, and, obviously, this objective is not attained by a mere reference in the advertisement to the fact that one may ascertain the terms and conditions of the guarantee by looking elsewhere.

(c) "The Commission is aware of the fact that the advertising of automobile guarantees may present complications because of the numerous conditions which the guarantees contain. But this factor alone makes the disclosure all the more important in order to avoid deception of consumers."

[31 FR 8621, June 22, 1966]

§ 15.64 Pledge of adherence to FTC trade practice rules as a condition to membership in trade association.

(a) A trade association proposing to require applicants for membership to certify to it that they are following the Federal Trade Commission's trade practice rules for the industry involved, as a condition of membership, has been advised by the Commission that this would not be illegal.

(b) The association informed the FTC it is aware of the fact that it is not authorized to enforce the law, but that it feels those who do not observe the rules are not operating their businesses in a manner which is strictly in the public interest and therefore should not be eligible for membership. It stated that it contemplates no enforcement program beyond requiring the pledge and referral of appropriate cases to the Commission.

(c) "On the basis of the information you have presented," the FTC's advisory opinion said, "the Commission has concluded that the inclusion of this pledge on the application for membership would not, in and of itself, appear to violate any of the laws administered by the Commission. This, of course, assumes that the pledge will be required of all applicants alike."

[31 FR 8621, June 22, 1966]

§ 15.65 Broadcast of suppliers' commercials in retail stores conditionally approved.

(a) In an advisory opinion the Federal Trade Commission has given conditional approval to the proposal of a promotional concern to arrange for the broadcast of suppliers' commercials in retail stores.

(b) The concern presently provides—for a monthly charge—retailers with a tape player unit, necessary speakers and tapes for retailer controlled in-store background music.

(c) The concern proposes to add on the tapes commercial messages of various manufacturers who supply products sold by retailers. The commercials will play at timed intervals. The concern will solicit various manufacturers for the commercials on a contract basis, record the messages, retain all money paid by suppliers for the service, and offer the background music, commercial tapes and equipment free of charge to all retailers on a nondiscriminatory basis in particular classifications of retailers in each geographic area in which the promoter markets his service.

(d) The Commission said the issue here "is whether this particular program is likely to result in the discriminatory furnishing of services or facilities by the manufacturers who might participate. The answer is wholly dependent upon the manner in which it is administered."

(e) The Commission pointed out that the proposal as submitted would not be subject to objection if: (1) All customers entitled to participate are notified of the program's availability, (2) the selection of trade areas and the definition of the same, in fact, include all customers competing in the distribution of the products of all participating manufacturers, and (3) the classification of retailers chosen to participate, such as food stores, does not exclude any retailers in another classification who in fact compete in the distribution of the products of the participating manufacturers.

(f) "Simply stated," the Commission said, "the law in this area requires a seller to treat his customers with fairness, whether in respect to the prices he charges, the allowances he pays, or the services he furnishes. This objective cannot be achieved by resort to mechanical formulas, but only by constant attention to the prevailing facts in any given situation. What may look fair on the drawing board may be found unfair in the market and, if so, the market must prevail." With the reservations above as to actual market conditions, it is the Commission's opinion that this proposal is not otherwise subject to objection.

[31 FR 8871, June 25, 1966]

§ 15.66 Magazine publisher's promotional allowance program approved.

(a) In an advisory opinion the Federal Trade Commission approved a promotional allowance program proposed by the publisher of a magazine.

(b) The publisher intends to grant newsstand operators an allowance of 10 cents per copy sold upon their certification that the magazine in question was displayed flat on a magazine stand or full cover vertical in a rack at each checkout position. The publisher will communicate this offer to magazine retailers by printing the display offer on an inner page of the magazine with an appropriate and conspicuous notice or "slug" on the outside cover alerting the retailer to the availability of the plan, details of which may be found on a page specified.

(c) "Since it appears," the Commission advised, "that all newsstand operators handling your publication would be alerted to the availability of the display allowance by reason of the conspicuousness of the 'slug,' it is our opinion that your promotional program, so long as it is implemented as described, complies with the requirements of section 2(d), amended Clayton Act, and newsstand operators receiving payments thereunder would not be liable to a charge of violating the law. In reaching this conclusion the Commission has assumed that the promotional allowance offer will be repeated in like manner from time to time so that its availability will be made known to newsstand operators who begin selling your magazine subsequent to the date of the initial offer".

[31 FR 8871, June 25, 1966]

§ 15.67 Functional discount to "premium" book jobbers.

(a) The Federal Trade Commission has advised a publisher of soft cover books that its proposed plan—if implemented as outlined—to grant an extra discount to "premium jobbers" would not violate the law.

(b) The publisher distributes its books through retailers, wholesalers, and book jobbers, and grants identical discounts to the latter two who are in competition with each other.

(c) According to the plan as submitted to the Commission, the publisher proposes to grant an extra discount to all premium jobbers who sell books to institutional customers (savings banks, insurance companies, industrial corporations, etc.) for use as promotion pieces, premiums, or prizes on a giveaway basis. To the extent that any premium jobber also sells to the regular trade in competition with other wholesalers and retailers, the publisher will either refuse to fill orders or grant only a normal wholesale discount.

(d) The proposed extra discount, the Commission advised, "is obviously functional in nature" and while the Clayton Act, as amended by the Robinson-Patman Act, "does not mention functional pricing the Commission has held that a seller is not forbidden to sell at different prices to buyers in different functional classes provided that injury as contemplated in the law does not result * * *. Applying the law to the facts presented by this request, it would appear that the granting of the extra discount to the premium jobbers would not result in a violation of law if the facts are exactly as represented * * * and if the proposal is implemented precisely as outlined."

(e) The "discount must be granted only for those sales made to the institutional customers described who use the books as giveaways and not for resale" and the "discount must be made available" to all customers of the publisher who in fact compete with each other in the resale of the publisher's book to institutional accounts, the Commission continued.

(f) It cautioned, however, that if the publisher should classify "certain distributors or wholesalers as premium jobbers and permits no one else to sell to the institutional customers, which could be accomplished by granting the extra discount only to those so classified, a serious question could be raised if the so-called premium jobbers also sell to regular retailers in competition with other wholesalers."

[31 FR 8913, June 28, 1966]

§ 15.68 Clearance given for use of pseudonym for doctor's real name on radio programs.

(a) The Federal Trade Commission has issued an advisory opinion that it would not object to the use of a pseudonym in lieu of the doctor's real name on radio programs under the following circumstances.

(b) The requesting party proposes to produce two radio feature programs offering medical advice to be written and supervised by licensed physicians whose ethics prohibit the use of their real names. Both programs will be sponsored commercially but the commercials will be separated distinctly and clearly from the medical advice being given, and there will be no endorsement, express or implied, of the product by the doctor.

[31 FR 8913, June 28, 1966]

§ 15.69 Foreign origin: razor blade dispensers.

(a) The Commission rendered an advisory opinion advising an American manufacturer of razor blades that it would not be necessary to disclose the country of origin of imported plastic razor blade dispensers and end clips into which were packed domestically manufactured blades, nor was there any objection to labeling the completed package as made in this country. The Commission was of the view that such a description would be taken as applying to the blades and that the purchaser would have no real concern with the origin of the dispenser which is designed to be thrown away after the blades are used.

(b) The facts were that after the dispenser cases and end clips were received in this country, a spring and the blades would be inserted, a pusher slide added and the end clip put in place. The spring, slide or pusher and the blades would be manufactured in the United States.

[31 FR 9214, July 6, 1966]

§ 15.70 Bargain offers based upon purchase of other merchandise.

(a) The Commission rendered an advisory opinion disapproving a retailer's proposal to offer a free sewing machine with the purchase of a cabinet.

(b) Under the terms of the proposed plan, the retailer intends to place one sewing machine on display in various locations, such as bowling alleys, supermarkets, shopping centers, etc. A nearby sign will invite one to fill out a registration card and deposit same in a box. Each month one name will be drawn from the box in each location where the machine is on display and the winner will receive a free sewing machine with cabinet. In addition, 50 names will be drawn from each box and these persons will be sent a letter informing them they can obtain a free sewing machine head simply by purchasing the cabinet. According to the letter to be sent to the 50 winners, the cabinets range in price "from $39.95."

(c) In its opinion, the Commission concluded as follows: "* * * that part of your plan which provides for prospective customers to win a free sewing machine with cabinet is unobjectionable. However, the Commission is of the opinion that part of the proposed plan which offers to 50 persons a 'free' sewing machine head for the price of the cabinet involves the sale of merchandise by means of a lottery or by means of a chance or gaming device and therefore would be illegal as an unfair trade practice under section 5 of the Federal Trade Commission Act. As a result, the Commission cannot give its approval to this aspect of your proposed plan in its present form."

(d) Commenting upon other features of the proposed plan, the Commission said: "When a seller offers to supply one article 'free' or 'at no extra cost' in conjunction with the purchase of another article, he is thereby representing to prospective customers that the article which is to be purchased is being sold at no more than the price at which it is usually sold in substantial quantities. Accordingly, if you should eliminate that aspect of your proposed plan appealing to the public's gambling instinct, then the price of the cabinets which the consumer is to purchase in order to obtain a 'free' sewing machine head must meet this standard."

(e) "Finally," the Commission's opinion concluded, "there must be a bona fide effort to sell the merchandise offered and a plan of this nature may not be used simply as a means to obtain leads which will be used to sell more expensive cabinets and/or sewing machines."

[31 FR 9214, July 6, 1966]

§ 15.71 Products composed of ground leather may not be described as "leather" without proper qualification.

(a) In an advisory opinion issued by the Commission, it said that a product composed of ground leather may not be described as "leather" without proper qualification.

(b) The product in question involved a manicure case, the outer portion of which was composed of 85 percent to 90 percent ground leather combined with latex rubber. In its opinion the Commission said, "the use of the word 'leather,' without qualification, means top grain leather." "Since the manicure case is composed of ground leather," the Commission added, "it would be improper to describe it as leather without proper qualification." The Commission opinion then pointed out several ways in which this could be done, such as:

"Ground leather" (or "shredded leather" or "pulverized leather").
"Composed of ground leather."
"Contains ground leather."

(c) The Commission's opinion further pointed out that, if the requesting party decided not to disclose the ground leather composition of the case, it would be necessary to disclose that the outer portion is not leather by such language as:

"Not leather."
"Imitation leather."
"Simulated leather."

"The reason for this," the Commission added, "is that the outer portion of the case has the appearance of leather and in order to remove the potential deception inherent in its appearance, it is necessary to disclose the fact that the material is not leather."

[31 FR 9794, July 20, 1966]

§ 15.72 Franchise agreement.

(a) A distributor of electronic equipment requested the Commission to render an advisory opinion with respect to the legality of a proposed franchise agreement with its dealers. A Schedule of Fair Trade Prices was to be attached to and made a part of the agreement and the dealer must agree that he will not advertise, offer for sale or sell any products at less than the fair trade prices, nor make any refunds, discounts, allowances, or concessions which will have the effect of decreasing those prices, nor offer any of the fair traded items in combination with other merchandise at a single, combination, or joint price. The agreement further provided that this provision should be applicable only in those States where agreements of this character are lawful.

(b) The Commission advised that in view of the McGuire Act amendment to section 5 of the Federal Trade Commission Act it could see no objection to inclusion of the provision in the agreement. However, the Commission added, the responsibility rests squarely upon the seller exacting such agreements from his dealers to see that they are not given effect outside those areas where permitted by State law, for then no exemption would exist to protect the agreements from established antitrust rules applying to resale price maintenance.

(c) Even though the contract provides that this provision shall be applicable only in those States where such agreements are lawful, it would appear that to some extent the burden is placed upon the dealer to ascertain whether or not the agreement is lawful in his own State before he can know whether or not he is obligated to honor it. If this has the effect of creating a situation whereby the Schedule is generally adhered to in States where fair trade is not legal, the presence of the provision in the franchise agreement could raise a serious inference of an unlawful resale price maintenance program in those States.

(d) The Commission further advised that such pitfalls can be avoided in the franchise agreements with dealers in nonfair trade States by specifically eliminating therefrom provisions relating to the maintenance of fair trade prices. If the distributor desires to circulate price schedules to dealers in nonfair trade States, it would be more appropriate to circulate them under the heading "Suggested Prices" rather than "Fair Trade Prices." In the alternative, the danger of involving dealers in illegal resale price maintenance could be avoided by expressly noting on the franchise agreement those States wherein the provisions relating to maintenance of fair trade prices cannot be given effect.

(e) Additionally, the Commission noted the provision that the distributor will establish, with the aid of the latest marketing information, a reasonable yearly sales volume objective of $—— and this volume will be a consideration in yearly franchise renewal. The Commission advised that it could see no objection to the establishment of such quotas so long as they are reasonable. However, the distributor was advised that much of the legality of any franchise system depends upon the manner in which the agreements are implemented and enforced, for if apparently reasonable reservations of rights by the distributor are in practice administered in an unreasonable manner, so as to unfairly encroach upon the freedom of the licensees, an agreement which is legal on its face can become illegal in effect.

[31 FR 9794, July 26, 1966]

§ 15.74 Rejection of description "golden" for nongold thimble.

(a) The Federal Trade Commission has rendered an advisory opinion objecting to both the description "golden" for a nongold thimble, and the accompanying explanatory phrase "electroplated with real gold".

(b) "Since the thimble in question is not composed throughout of 24 karat gold, unqualified use of the word 'golden' would be improper," the FTC's advisory opinion stated.

(c) Further advising that "the phrase, 'electroplated with real gold', would constitute neither adequate qualification of the word 'golden', nor a proper representation standing alone", the Commission pointed out that the gold flashing on the thimbles is between three and seven millionths of an inch thick and that "a coating of gold of less than 7/1,000,000 of an inch in thickness is too thin and insubstantial to warrant the description 'gold electroplate'."

[31 FR 9977, July 22, 1966]

§ 15.74 Conditional approval given 3-party promotional plan.

(a) The Federal Trade Commission has given conditional approval to a promotional concern's plan to provide a music service to supermarkets which would include "spot" advertisements paid for by their suppliers.

(b) The requesting party would set up a background music network specializing in supermarkets. It would own the equipment and install same without charge to the store operator. About every 2½ minutes a "spot" advertisement paid for by advertiser-suppliers to the store would be made over the network, for each of which, each participating store outlet would receive a small commission.

(c) In addition, the requesting party will offer an in-store promotion service to advertiser-suppliers so that they may provide proportionally equal treatment for nonparticipating stores, who will receive either in-store advertising materials or cash payments based on a designated formula.

(d) Most of the advertisements would feature products sold in the stores. In some stores, announcements regarding house brands could be made by means of separate circuits. Advertisers would pay for the service on a per spot-per store basis. The contracts between the parties are to contain a clause to the effect that suppliers agree not to discriminate between participating and nonparticipating customers.

(e) In the advisory opinion the Commission said that "implementation of the plan probably would not result in violation of Commission administered statutes. This approval is being given conditionally and is contingent on the plan when in operation actually providing on a realistic basis for promotional assistance to all competitors entitled to it under sections 2 (d) and (e) of the Robinson-Patman Amendment to the Clayton Act."

[31 FR 9977, July 22, 1966]

§ 15.75 Publisher's display allowance plan given conditional approval.

(a) A magazine publisher has received conditional approval from the Federal Trade Commission of its promotional assistance program proposed for the New York city area.

(b) The Commission said its understanding is that the program would operate substantially as follows:

(1) Each competing retail magazine seller in or out of the area would be notified of the program by first class mail by the publisher and afforded the opportunity to choose either of two plans for each publication of the publisher he sells.

(2) Under Plan 1, the dealer would be given a rebate of 10 percent of the cover price for each copy of a magazine sold, provided he maintained two displays (full cover exposed, flat stack or vertical display) of the publication through its "on sale" period in (i) the maximum traffic area of his newsstand and (ii) on the main or auxiliary racks. Under Plan 2, the dealer would be given a rebate of 5 percent on the same basis as under Plan 1 for maintaining one display in the maximum traffic area. "Maximum traffic area" means: Where the retailer sells most of his magazines—where the largest display of magazines is located.

(3) In the event of a sellout of an issue, the dealer would agree to reorder immediately. Both the publisher and its distributor would spot check on dealer compliance. A dealer would submit quarterly reports together with statements of performance to the publisher to claim his rebate.

(c) The Commission's advice was that "implementation of the program as described probably would not result in violation of laws administered by the Commission *Provided*: (i) The program is offered to eligible new entrants into magazine retailing when they receive their initial shipment of magazines and (ii) The notice to dealers is changed to include a definition of 'maximum traffic area' conforming to the meaning set forth above."

[31 FR 10116, July 27, 1966]

§ 15.76 Foreign origin disclosure of individual items repackaged in combination sets.

(a) The Federal Trade Commission announced that it had rendered an advisory opinion dealing with disclosure of foreign origin of imported novelty items which will be repackaged in various combination sets in this country.

(b) The items, both textile fiber and nontextile fiber products, which are labeled as to specific country of origin at the time of their importation, will be repackaged in sets in such a manner that the labels will not be visible to prospective purchasers.

(c) As to sets composed entirely of imported nontextile fiber products, the Commission said "that a proceeding by it to require disclosure of origin on the package would not appear to be warranted in the absence of any showing of material deception."

(d) However, as to any combination set containing only imported textile fiber products, the Commission said the specific country of origin of these products must be disclosed in such a manner that it would be observed upon casual inspection by prospective purchasers before, not after, the purchase. The necessity of this disclosure is based upon the requirements of the Textile Fiber Products Identification Act and the rules issued thereunder. The disclosure, the Commission said, "does not necessarily have to be on the outside of the package; it could be inside the package, provided it would be clearly visible through the cellophane cover. The point is that the disclosure must be in some position on the package where it would be observed prior to the purchase, not afterward."

(e) If imported textile fiber products are packaged in the same combination set with imported nontextile fiber products, the Commission advised that "it would also be necessary to disclose the foreign origin of the nontextile fiber components. Otherwise, prospective purchasers are likely to be misled into the mistaken belief, through the affirmative disclosure of the foreign origin of the textile fiber products, that the nontextile fiber products packaged therewith are of domestic origin."

(Sec. 1, 72 Stat. 1717, as amended; 15 U.S.C. 70)

[31 FR 10116, July 27, 1966]

§ 15.77 Proportionally equal treatment for competing customers under promotional assistance programs.

(a) In advisory opinions by the Federal Trade Commission, two promotional assistance programs devised by third parties for grocery retailers and suppliers have been approved if the proposed plans are implemented as represented.

(b) Under the one plan, an independent promoter would supply food retailers with racks in which to display recipe cards and uniformly pay the retailer for providing space for each rack used. Manufacturer-suppliers:

(1) Would furnish participating customers with cards—containing recipes calling for the use of the manufacturer's products and a picture of the finished recipe item or of the manufacturer's product—on a proportionally equal basis related to the retailer's volume of sales of the product, (2) pay the promoter for the cards at a per-card-supplied rate, and (3) offer the plan to each customer by means necessary to insure complete notification of the plan to all competing customers. After each initial distribution, retailers would receive as many additional cards as requested up to 1,000 per month per product.

(c) The other plan, proposed by a separate promoter, would utilize a variation of the "jigsaw puzzle." Each time a shopper would pass the checkout stand (no purchase would be required) of a participating grocery retailer, she would receive a card from which four assorted pieces of a reproduction of a label could be removed. Upon collecting pieces necessary to form a complete facsimile of either a private or name brand label, she would be awarded a prize of trading stamps, cash or merchandise. In each 8-week period the plan would be in operation, eight different products will be involved, six of which will be name brands of participating suppliers and two private labels selected by participating retailers. If the retailer does not have private labels to enter in the program, his cost will be reduced on a pro-rata basis or he may select eight name brand products and pay the regular price which will be the same to each retailer and supplier per product per 1,000 cards (the cost of the program will be defrayed out of this charge). Each retailer will receive the same in-store displays and advertising material and each supplier will have his product pictured on each giveaway card. Necessary notification of the proposed plan will be given, and all competing retailers will be afforded the opportunity to participate.

(d) The Commission pointed out to the promoters that "it remains the supplier's responsibility to assure that in fact the retailers who compete with one another are dealt with no proportionally equal terms." If the plans are implemented in such a manner, they "would appear to satisfy the supplier's obligation of proportionally equal treatment and the suppliers participating * * * would not thereby violate any Commission administered laws."

(e) In reaching this conclusion, the Commission advised that it had relied particularly upon the below-described three representations by the promoters as to the manner in which the plans will be implemented.

(f) In each of the two promotions, the requesting party informed the Commission that:

(1) All competing retailers would be notified of their right to participate in the plan; and

(2) The plan would be made available to all competing retailers and offered to those located on the periphery of a given marketing area who compete with the participating retailers.

(3) The third representation relied upon by the Commission in the respective matters was that:

(i) (Puzzle promotion) A reduction in cost or alternative choice of either name brand products would be provided participating retailers unable to enter two labels in the plan.

(ii) (Recipe card promotion) Small retailers who, for space or other reasons, cannot utilize the larger racks but wish recipe cards featuring one or two profitable items, will be provided with a "snap-on" shelf rack for this purpose.

[31 FR 10357, Aug. 2, 1966]

§ 15.78 Disapproval of merchandizing plan involving a lottery.

(a) A retailer has been advised by the Federal Trade Commission that its proposed weekly drawings for portable radio-phonographs would be an unlawful lottery.

(b) Participants would be required to pay $2 a week for 20 weeks. The winner each week will be awarded a radio and will not be required to make any further payments. The participants who do not win will each receive a radio-phonograph at the end of the 20 weeks for which they would have then paid $40. The retailer advised that it regularly sells these instruments for $40.

(c) This proposal, the FTC's advisory opinion stated, "would constitute a scheme to sell merchandise by means of a lottery or game of chance, a sales device long held to be illegal under laws administered by this agency. The mere fact that each participant receives a thing of value for his contribution does not negate the existence of a lottery nor change the plan's essential nature as an appeal to the public's gambling instincts. Clearly, the participants in this drawing would be motivated by the chance of receiving something of more value than the amount they contributed. Hence, the nature of the appeal is unmistakable."

[31 FR 10358, Aug. 2, 1966]

§ 15.79 Rejection of deceptive firm name for skip-tracing operation.

(a) The Federal Trade Commission has rejected a proposal by a debt collection concern to send out skip-tracing material under a firm name such as Missing Heirs, Inc., requesting delinquent debtors to contact the company on a matter of importance and to furnish information concerning jobs, addresses, etc.

(b) Advising that "this proposal would be clearly illegal under previous Commission and court decisions dealing with skip-tracing practices," the Commission pointed out that its first "case involving a skip-tracing device was decided in 1943 and dealt with an identical subtefuge to that here proposed, that is the attempt to deceive debtors into believing that they were being contacted in connection with the settlement of estates. No matter what the device employed, and there have been many down through the years, the law has set its stamp against this type of deception."

(c) Consequently, the advisory opinion continued, the FTC "cannot approve the use of any representations or trade names which would have the effect of deceiving others as to the true nature of your activity or which fail to reveal that the purpose for which the representations are made or the information requested is that of obtaining information concerning delinquent debtors."

[31 FR 10572, Aug. 6, 1966]

§ 15.80 By-law prohibiting certain advertising claims by members of trade association.

(a) The Federal Trade Commission has informed a trade association that it cannot give its approval to a proposed amendment to the associations's bylaws which would prohibit a member from advertising that its service is faster and better in other towns than that of members who actually are in business in those towns.

(b) The Commission said in its advisory opinion that "the adoption of this proposal would be highly questionable under the antitrust laws for the reason that advertising is an element or form of competition and any agreement among competitors to refrain from legitimate and truthful advertising restricts competition.

(c) "If * * * [an industry member] wishing to compete in another city is denied the right to advertise that despite his geographical disadvantage he can furnish faster and better service than his local competitors, assuming the representation to be truthful, he is to that extent denied the right to compete effectively and local * * * [industry members] are thus insulated from outside competition.

(d) "If competition in an industry is to survive, the members must be left free to exploit in a lawful manner such advantages as they actually possess. Consequently, the proposed amendment to the Association's bylaws, cannot receive Commission approval."

[31 FR 10572, Aug. 6, 1966]

§ 15.81 Advertised satisfaction guarantee.

(a) In an advisory opinion the Federal Trade Commission gave qualified approval to the proposal by a marketer of a facial cream to advertise a "10 day trial" satisfaction guarantee.

(b) Its approval, the Commission said, "is based upon the assumption that there are no material limitations or conditions whatsoever attached to the guarantee. If there are any such conditions or limitations, they must be disclosed."

[31 FR 10733, Aug. 12, 1966]

§ 15.82 Disapproval of the marking "US Made" for items with substantial imported components.

(a) A Federal Trade Commission advisory opinion disapproved the marking "US Made" for two electric devices, one consisting of an imported motor assembled with an American-made casing and cord, and the other of which both the motor and the casing are imported and the cord is domestic.

(b) The Commission stated that "it would be improper to label either of the finished products as 'US Made' because this would constitute an affirmative representation that the entire product was of domestic origin, when in fact a substantial part thereof was imported."

[31 FR 10733, Aug. 12, 1966]

§ 15.83 Impropriety of labeling foreign-made machine with American-made parts added to it as "Made in U.S.A."

(a) The Federal Trade Commission has advised an American manufacturer that a machine made in a foreign country with certain American-made parts added to it by the domestic manufacturer may not be labeled "Made in U.S.A."

(b) The Commission said that it would be "improper to label the machine in question as 'Made in U.S.A.' because this would constitute an affirmative representation that the entire machine was of domestic origin, when in fact a substantial part thereof was imported."

[31 FR 11030, Aug. 19, 1966]

§ 15.84 Proper labeling of rebuilt fuses.

(a) The Federal Trade Commission made public an advisory opinion concerning the proper labeling of rebuilt fuses to be used by public utilities and commercial consumers of electricity.

(b) The requesting company inquired as to whether it will be necessary to label a fuse as "rebuilt" or "remanufactured" if it is broken down to its smallest components and all parts that are used are inspected to meet new parts standards.

(c) Advising that the concern's "rebuilt fuses would have to be labeled as such," the Commission cited its frequent holding, "in connection with a variety of products, that in the absence of an adequate disclosure to the contrary, merchandise which resembles and has the appearance of merchandise composed of new materials but which is, in fact, composed of reclaimed materials, will be regarded by purchasers as being entirely new and that a substantial segment of the consuming public has a preference for merchandise which is composed of new and unused materials. This has been held to be so without regard to the comparative quality of the new and rebuilt products, for in such matters the public is entitled to get what it chooses no matter what dictates the choice."

(d) Answering other questions posed by the company, the Commission stated: All "advertising material promoting the sale of these fuses should also contain a disclosure of their used or rebuilt nature, [but] it is not necessary, once this disclosure is clearly and conspicuously made, to repeat the word over and over again even where technical instructions are being given. Technical instructions for the use of these fuses are not ordinarily part of the advertising designed to induce customers to buy and, if not, there would be no requirement for disclosure in the instructions as distinguished from advertising."

(e) "Generally speaking, * * * the disclosure must be on the cartons, invoices and in advertising literature, as well as on the fuses themselves. However, the disclosure need not be placed on the fuses themselves if you can establish that the disclosure on the bags, boxes, or other containers is such that the ultimate purchasers, at the point of sale, are informed that they are rebuilt fuses. The question of informing the ultimate purchasers here becomes important in the event any of your customers also resell the fuses to others under circumstances where those ultimate purchasers are not informed as to their rebuilt nature."

[31 FR 11030, Aug. 19, 1966]

§ 15.85 Reference service for members of trade association.

(a) A national trade association has been advised by the Federal Trade Commission that its proposed reference service for members concerning problems encountered by them would not be unlawful "so long as the program embraces only an interchange of information and experience among members of the Association, and is not used as a device for a concerted boycott of particular sellers."

(b) The Association stated the purpose of the program is to assist its members to communicate with each other so that there may be a greater availability of the knowledge and experience acquired by them on materials used in the industry. Especially of interest is the experience of members with materials that have been newly developed and the properties and suitability of which are not yet widely known. Under the reference service members would be invited to write the Association advising it of any special experience or knowledge they have had with materials, either favorable or unfavorable.

[31 FR 11302, Aug. 26, 1966]

§ 15.86 Sales promotion plan involving a lottery rejected.

(a) In an advisory opinion the Federal Trade Commission informed a retailer that his proposed sales promotion is illegal because it involves the sale of merchandise by means of a lottery and therefore is an unfair method of competition and an unfair practice.

(b) The retailer planned to list certain selected items with the local bank. After the customer makes his regular purchase at the retail store, he checks with the bank, and if that particular item is listed with the bank, the customer is entitled to keep the merchandise without charge. On the other hand, if the item is not listed at the bank, the purchaser must pay the regular price for it.

(c) In reaching its conclusion that the plan was illegal, the Commission reasoned that "the mere fact that a purchaser receives a thing of value for his contribution does not negate the existence of a lottery."

[31 FR 11302, Aug. 26, 1966]

§ 15.87 Sale of silverware through plan involving lottery rejected.

(a) The Commission issued an advisory opinion (with Commissioner Elman not concurring) in which it disapproved a silverware manufacturer's plan because it involved the sale of merchandise by means of a lottery.

(b) Under the terms of the proposed plan, advertisements will be published inviting the reader to complete a contest entry form specifying his preference among certain flatware featured therein, together with his name and address. The reader will be invited to leave said form with the manufacturer's dealer or, in lieu of using the form featured in the advertisement, he can obtain the same form at his dealer or print the same information on a blank piece of paper and leave it with the dealer. At the conclusion of the contest, each dealer will draw the name of one contestant who will receive a free 4-piece place setting in the pattern specified on his entry form.

(c) There is absolutely no requirement on the part of any participant or winner to purchase or promise to purchase any merchandise. However, the rules further provide that if the winner purchased other settings in his particular pattern during the period of the contest, the dealer will donate additional pieces in that pattern equivalent in retail value to those purchased.

(d) In its advisory opinion, the Commission took the position that "the portion of the plan which awards a 4-piece place setting to the winner is unobjectionable."

(e) "However," the Commission added, "the matching provision on the part of the dealer creates the element of consideration on the part of participants and therefore constitutes the sale of merchandise by means of a lottery or by means of a chance or gaming device contrary to the provisions of section 5 of the FTC Act. As a result, the Commission cannot give its approval to this aspect of your proposed plan in its present form."

[31 FR 11607, Sept. 2, 1966]

§ 15.88 [Reserved]

§ 15.89 Proportionalized equal treatment for competing customers under three-way promotional program involving recipes for free distribution.

(a) The Commission approved, with qualification, the use of the tripartite recipe plan promoting the sale of food products.

(b) Under the terms of the proposed plan, recipes will be supplied without charge to all food stores in a given marketing area for free distribution to the stores' customers. Each store which participates in the plan will have its name imprinted on the recipe card, together with the names of the participating food suppliers and their products. Availability of the plan will be publicized in a monthly trade magazine.

(c) No money will be paid to retail stores which participate in the plan, and it will be supported solely on the basis of the sale of advertising to various food suppliers who will pay a certain fee per 1,000 recipe cards to the promoter of the plan. The promoter will in turn have the recipe cards printed and distributed to the participating retailers.

(d) In its opinion the Commission said that section 2(e) of the Robinson-Patman Act "requires a supplier to treat all of his competing customers on a nondiscriminatory basis, which means that if the supplier furnishes promotional assistance to one customer he must make that assistance available on proportionally equal terms to all competing customers." The Commission also pointed out that the courts have affirmed the principle that a "supplier must comply with this provision of the law (section 2(e) of the R-P Act) irrespective of whether the promotional assistance is furnished to the retailer directly or through an intermediary."

(e) In giving its qualified approval to the proposed plan, the Commission said that the following three conditions must be met:

(1) All competing retailers must in fact be notified of their right to participate in the proposed plan. (The Commission did not pass upon the adequacy of the proposed means of notification because it did not have the facts upon which to base a judgment.)

(2) The plan will be offered to all competing retailers. This means that some retailers who, geographically, are not in a given marketing area must be offered the plan if they are on the periphery of that marketing area and in fact compete with the favored retailers.

(3) The plan will be made available to all competing retailers irrespective of their functional classification. Thus, nonfood stores which handle food items sold in grocery stores must also be accorded the same opportunity to participate in any promotional assistance given by the food suppliers to competing grocery outlets.

[31 FR 12015, Sept. 14, 1966]

§ 15.90 Legality of notice calling attention to page on which magazine publisher's promotional assistance program is located.

(a) The Commission advised the publisher of a monthly magazine that implementation of the promotional assistance plan outlined below would not result in violation of Commission administered law.

(b) Under the plan, a notice would be printed quarterly on the cover of the magazine calling attention to the page in that issue on which the payment and the essentials of the retailers' service obligations would be set forth in an item in the same size type as the magazine's textual material. The item would also reflect that the retailer must write to the magazine distributor to obtain a copy of the agreement containing full details. A retailer would obtain quarterly payments of 10 percent of the cover price of copies sold after certifying to the distributor that he—the retailer—had complied with the terms of the agreement. The agreement requires display of the magazine full cover flat or full cover prominent position on the principal magazine rack or full cover vertical in a rack at each checkout counter for the entire sales period of an issue.

[31 FR 12479, Sept. 21, 1966]

§ 15.91 Supplying domestic markets from foreign plant operated by an export trade association member raises possibility of unlawful interference with domestic trade and commerce.

(a) In an advisory opinion the Federal Trade Commission stated that an export trade association loses its statutory exemption from the antitrust laws if domestic prices are artificially or intentionally raised or lowered by the foreign operations of members with both foreign and domestic plants.

(b) The 1918 Webb-Pomerene Act authorizes American exporters to engage collectively in foreign trade through cooperatively organized trade associations registered with the FTC and subject to its supervision. The statute qualifiedly exempts such associations from the anti-trust laws in joint foreign trade ventures. For example, they may fix prices and quotas, pool products for shipment, and establish terms and conditions of sales to foreign markets.

(c) The requesting association said that certain American companies have both foreign and domestic plants producing the product involved, and asked whether a Webb-Pomerene association might include such companies as members if the membership only discuss the price of their exports from their domestic plants.

(d) The Commission's advisory opinion noted that some of these American-owned foreign plants "are shipping a substantial proportion of their output into the United States and are supplying a substantial share of the domestic consumption * * *. Although it has been held that members of Webb-Pomerene associations may own plants located outside the United States, the use of such plants to supply the domestic market raises a possibility that domestic prices may be intentionally or artificially enhanced or depressed in contravention of the Webb-Pomerene Act."

(e) In short, the Commission advised, "while membership in a Webb-Pomerene association by firms owning foreign establishments is permissible the statutory exemption enjoyed by the association is lost if artificial or intentional enhancement or depression of domestic prices is in any way traceable to the foreign operation of member firms."

[31 FR 12479, Sept. 21, 1966]

§ 15.92 Cooperative advertising program must be made available to all competing customers.

(a) The Commission was requested to furnish an advisory opinion concerning a proposal by an advertising agency to solicit suppliers of products sold in drug stores to permit the agency to place some of their money for advertising in one trade area. Suppliers were to be charged at the rate of $3 per each store which agrees to participate. The agency will notify all drug stores in the area that, for example, supplier A wants to participate in the plan and ask each store to mark a self-addressed card as to whether they either displayed the item and/or if they would purchase additional products either for the display or in anticipation of the advertising campaign of that product. If 700 stores return the card as evidence of their in-store cooperation, the supplier would then pay the agency $2,100 at the rate of $3 per store. The agency will then take this sum and place the money in an advertising campaign for the supplier. In return for the pharmacists' cooperation, the agency will tag each supplier's advertising with "this product available at your local pharmacy." No specific names will be mentioned.

(b) Although each supplier's advertising will be run separately and there will be no joint advertising, each will be able to buy advertising under discounts earned from collective buying of space under the contract for all participating suppliers. There will be no payment to any individual druggist or association of druggists. Payments to the agency will be by the media in the form of agency commissions. Further, none of the advertisements to be published will contain selling prices for any of the products featured therein.

(c) The plan was subsequently amended so that the offer would be extended to all competing retailers of the products advertised instead of just to drug stores. However, the agency advised that it had already received negative answers from a number of food chains and other retailers and, consequently, it proposed to leave the tag reading as above, but that if any of the others subsequently indicated they would like to participate, the tag would be amended to read "available at your local pharmacy and grocery store" or "variety store" as the case may be. All of these stores will continue to be notified periodically.

(d) The Commission advised that while no specific customer will be named in the proposed advertisements, the fact that a class of customers will be specified, namely, pharmacies, means that the principles of section 2(e) of the Robinson-Patman Act apply and each supplier would owe a duty to make this proposal available on proportionally equal terms to all of their competing customers. The Commission further advised that it appeared the agency proposed to operate the plan in such manner as to meet the test of that section, assuming, of course, that all competing retailers will be notified of the availability of the plan and offered an opportunity to participate and that the tag will be changed in an appropriate manner if other than pharmacies evidence an interest.

[31 FR 13210, Oct. 13, 1966]

§ 15.93 Newspapers right to reject advertising.

(a) The Commission was requested to render an advisory opinion with respect to the right of a newspaper to reject advertising which it regarded as false and misleading. While the question propounded involved the right of the paper to reject an advertisement by an automobile dealer which impliedly represented that a used car in its stock was a repossession when it was not, the Commission noted that the question presented went far beyond the fate of the particular advertisement and involved the basic question of whether or not a newspaper has the right under the antitrust laws to reject advertisements which are submitted to it for publication.

(b) The Commission further noted the fact that the newspaper, which is in open competition with other newspapers in the same area, is acting in accord with the exercise of its own independent judgment and not in concert with others in proposing to reject the particular advertisement.

(c) Under these circumstances, the Commission advised that it could see no objection to the exercise by the newspaper of its right to refuse to accept the advertisement.

[31 FR 13210, Oct. 13, 1966]

§ 15.94 Promotional assistance plans must be reasonable and nondiscriminatory.

(a) The Commission issued an advisory opinion regarding the obligations of a supplier in offering alternatives to his basic plan for providing promotional assistance to his competing, retailer-customers by placing advertisements on shopping carts.

(c) The requesting party, a promoter, had a basic promotional assistance plan which some competing retailer-customers of suppliers participating in the plan were functionally unable to use because the retailer-customers did not have or use shopping carts. The plan provided that such competing retailer-customers were to be offered a reasonably usable alternative way of obtaining the proportionally equal assistance to which they are entitled under the provisions of section 2(d) and (e) of the Robinson-Patman amendment to the Clayton Act.

(c) The question presented was whether a retailer-customer, whose business operation was such that he was functionally able to use and benefit from the basic—shopping cart—plan could demand the alternative form of assistance, if he so desired.

(d) In its opinion, the Commission stated that whether a supplier's promotional assistance plans are reasonable and nondiscriminatory in their application is essentially a question of fact. The Commission held that if the retailer-customer was able, in fact, to use and benefit from the basic plan offered, but rejected same, the supplier need not offer such retailer-customer the alternative plan. The Commission pointed out that the burden of proof on this issue of fact as it may arise in particular cases will rest upon the supplier. The Commission added that if a competing retailer-customer is unable to use the basic plan, because of the nature of his business operation, he must be offered an alternative plan. However, if he rejects the alternative plan for reasons of his own and said plan could be reasonably used to his benefit, then, the supplier would incur no liability for declining to offer another alternative.

[31 FR 13423, Oct. 18, 1966]

§ 15.95 Foreign origin; computers.

The Commission issued an Advisory Opinion to the effect that it would be improper to use the "Made in U.S.A." designation in labeling or advertising a computer of which 23 percent of the factory cost was accounted for by imported parts and 77 percent was accounted for by domestically produced parts, assembling and factory testing in the United States.

[31 FR 13423, Oct. 18, 1966]

§ 15.96 Product certification program.

(a) The Federal Trade Commission advised a producer association that its proposed certificated program for its industry product, including the award of a certification mark, would not be objected to under Commission-administered law provided certain conditions are met.

(b) Under the proposed program, certification would be based on availability of production personnel with defined minimum training and experience, the possession of minimum test and quality control equipment, and the use of recognized production techniques. A certification mark could be awarded to, and used by, those qualifying.

(c) Certified producers would be subject to periodic checks to insure that the required standards were being maintained. Failure to maintain standards could result in decertification and withdrawal of the right to use the mark.

(d) The Commission opinion contained the following conditions:

(1) All present or future producers are to have free, unrestricted, and nondiscriminatory access to the program, whether association members or not.

(2) The association will affirmatively offer and accord to nonmembers an equal opportunity for certification at a cost no greater than, and on conditions no more onerous than, those imposed upon comparably situated association members for whom comparable services are rendered.

(3) A uniform certification mark will be awarded to all who qualify.

(4) General supervision of the certification program will be vested in a policy board, or committee, substantially representative of all producers, such board, or committee, to have, among its other duties, the responsibility for insuring nondiscriminatory access to the program.

(e) Finally, the Commission noted (1) that it expresses no opinion as to the validity of the standards which are adopted, and (2) that its approval would be of no force or effect should the proposed program be implemented in a way which contravened Commission-administered law.

[31 FR 13754, Oct. 26, 1966]

§ 15.97 Trade association code governing dealings with customers.

(a) The Commission rendered an advisory opinion advising a trade association of suppliers that a number of serious questions would be likely to arise from an agreement by its members as to a code or set of conditions governing the members' dealings with their customers.

(b) Among the conditions singled out by the Commission for question was one creating uniformity in the terms of delivery. The Commission stated its view to be that the method and manner of delivery can be an element of competition among the members of an industry which this provision would at least have a tendency to eliminate. The creation of uniformity in the terms of delivery may be convenient for the members of an industry but this factor is outweighed by the benefits to the public of competition among those members and it is this competition which the law seeks to protect and preserve.

(c) Much the same objection was raised to the sections which provided that by accepting goods the purchaser shall be deemed to have approved them and no action shall lie against the vendor except as regards hidden defects; that claims for defects must be made within 30 days; and that the purchaser shall not be entitled to any compensation for any consequential loss whatsoever. The Commission advised that while it may be that a unilateral agreement among the members could not change the legal liabilities as between the parties when disputes arise, entering into this agreement could result in the suppliers presenting a solid front to their customers. In the Commission's view, such matters are best left to the business judgment of the individual suppliers.

(d) The Commission then singled out the provision dealing with prices, which provided that the purchaser shall pay the prices current in the relative trade area at the time of delivery and that the vendor shall, if so requested, send to the purchaser a list stating the prices of goods and the period for which such prices are to apply. Nothing that the section was ambiguously worded and susceptible of more than one interpretation, the Commission concluded that the suppliers might well feel justified thereunder in agreeing among themselves to adhere to their published price lists until such are changed. Under well-settled principles of antitrust law, such an agreement would clearly be illegal.

(e) The Commission also expressed some concern with the section dealing with payments, which provides that the purchaser shall pay the invoiced amounts within 30 days after date of delivery and if payment is made at a later date the vendor shall be entitled to interest. The Commission advised that it could not put its stamp of approval upon an agreement by the members of an industry as to the length of time during which credit is to be extended, stating that it would seem such matters are best left to the independent judgment of each supplier and should not be determined adversely to the interests of the customers by agreement among those suppliers.

(f) Finally, the Commission took note of the provision dealing with contracts, which stated that all or part of the conditions could be declared applicable to a contract entered into for a specified period, which could be a calendar year unless otherwise agreed. Such contract shall imply that the purchaser agrees that during the period specified in the contract all and any goods specified "or as customarily purchased from such suppliers will be obtained solely from the vendor * * *." The Commission felt that this clearly sanctions full requirements contracts for periods of 1 year or more and that such contracts are nothing more than exclusive dealing agreements for limited periods of time. Whereas they are not per se illegal, generally, the law may be stated to be that they are illegal if they foreclose competition in a substantial share of the market. This would naturally require knowledge of a number of factors not known to the Commission and not likely to be known when dealing with a proposed course of action. In the case of any particular supplier, the Commission would need to know the duration of the agreements, the number of customers covered by such agreements and the percentage of the total market which would thereby be foreclosed to competitors. In view of these uncertainties, the Commission felt the best it could do would be to advise that the problem exists but that no opinion could be expressed on a prospective basis because of lack of knowledge of the essential factors which would need to be known before an opinion could be rendered.

[31 FR 13754, Oct. 26, 1966]

§ 15.98 Removal of foreign origin disclosure and use of word "manufacturing."

(a) The Commission advised a distributor of imported time clocks that the "removal or obliteration of foreign origin disclosures on imported products is under certain circumstances a violation of the Tariff Act which is administered by the Bureau of Customs" and invited the distributor to contact that Bureau on this particular point. The distributor wanted permission to remove the foreign origin label prior to reselling the time clocks in the United States. "Regardless of the position of that Bureau," the Commission added, "such removal or obliteration in the circumstances you describe may result in a deception of the purchasing public as to the country of origin" and might be found to be in violation of the FTC Act.

(b) Permission was also requested to use the word "manufacturing" in the trade name of the company and in advertising, even though the time clocks are imported in their finished state. The Commission was of the opinion that the use of such word "would have the tendency to lead consumers and others into the belief, contrary to fact, that they are dealing directly with the manufacturer and so to mislead or deceive them. In these circumstances, it would not be proper to use the word 'manufacturing' or any other word of similar import in your trade name or in your advertising or to otherwise represent your company as a manufacturer."

(c) Finally, the distributor wanted to know if it would be proper to represent his company as a manufacturer if it performed a "small part" of the manufacturing process on the time clocks. In regard to this question, the Commission reached the following conclusion:

(d) "The amount of manufacturing which a concern must engage in to justify representing itself as a manufacturer will vary from case to case, depending on the specific circumstances. Your question, however, indicates you intend to operate as a manufacturer only in the technical sense and not in a substantive way, in an attempt to justify the use of a term not otherwise a correct description of your business. We likewise do not believe, in these circumstances, that it would be proper to represent your company as a manufacturer."

[31 FR 13913, Oct. 29, 1966]

§ 15.99 Retailer's advertising of "reward" approved.

(a) The Commission advised a retailer of mobile homes and house trailers that he might properly advertise a $100 "reward" to be paid to anyone referring a purchasing prospective customer provided such offer was a bona fide offer implemented in good faith. In the Commission's view, such advertisement would amount to the offering of a finder's fee or, perhaps, a commission on a sale.

(b) The Commission pointed out that the prospective purchaser might himself claim the "reward." In such case, the purchaser must realistically benefit in the amount of $100.

[31 FR 13913, Oct. 29, 1966]

§ 15.100 Lifetime guarantees for aluminum siding.

(a) A seller of aluminum siding requested the Commission to render an advisory opinion concerning the legality of its proposed use of a "Lifetime Guarantee" for aluminum siding.

(b) The proposed guarantee would represent that the siding will not rust, peel, blister, flake, chip, or split under conditions of normal weathering for the lifetime of the original owner. If, after inspection, the seller determines that a claim is valid under the guarantee the seller will within 3 years after installation furnish all materials and labor necessary to repair or replace, at the seller's option, all siding at no cost to the owner. For the next 7 years, the seller will furnish all materials and labor at a cost to the owner of 8 percent of the then current price for each year or part thereof after the third year. For the next 10 years, the seller will furnish all materials and labor at a cost to the owner of an additional 3 percent of the then current price for each year or part thereof after the 10th year. Thereafter, the seller will furnish only the material necessary to repair or replace, at the seller's option, at a cost to the seller of 10 percent of the then current price. The owner must assume all other costs, including 90 percent of the cost of materials and 100 percent of the cost of labor.

(c) In addition, the seller furnished the results of extensive laboratory and field testing of house siding since 1948 under every type of environment which would lead to the conclusion that no aluminum siding, no matter what its finish, will last for a lifetime. In fact, the evidence submitted, if accepted as true, would establish that the maximum life expectancy of such siding under normal conditions would come closer to 20 years and would be considerably less under more extreme circumstances. This is based upon experience indicating that even if it does not rust, peel, blister, flake, chip or split, the finish will weather to such an extent as to require repainting within that time.

(d) The Commission made it plain that it has not conducted its own investigation in order to verify the accuracy of this evidence and that the comments set forth in its opinion were based upon the facts as presented and upon the assumption that those facts were correct. On this basis, the Commission advised that it would not be legal for the seller to employ a guarantee to represent that the siding will last for a lifetime or for any other period beyond what can reasonably be expected.

(e) The opinion pointed out that both the trade practice rules for the Residential Aluminum Siding Industry and the Commission's Guides Against Deceptive Advertising of Guarantees contain the principle that a guarantee shall not be used which exaggerates the life expectancy of a product. In such a case, the guarantee itself constitutes a misrepresentation of fact even though all required disclosures of material terms and conditions might be made in all advertising of the guarantee. This simply recognizes the principle that a guarantee can be used as a representation of an existing fact as well as a guarantee. Viewed in this light, use of this guarantee would constitute an affirmative representation that the siding will last for the lifetime of the owner when the evidence furnished would indicate this is not true. The gravamen of the offense would be the affirmative misrepresentation of the life expectancy of the product and this could not be corrected by a mere disclosure that what is represented to be a fact is not actually true.

(f) Of equal importance in the Commission's view was the fact that the seller here proposed to couple two basically inconsistent provisions in the same guarantee. One was the use of the lifetime representation and the other was the prorated features. The Commission stated its opinion to be that it is conceptually impossible to combine the two in the same guarantee when the proration period virtually terminates at the end of 20 years. A guarantee cannot be for a lifetime if it terminates after 20 years. Undoubtedly, many owners will live far beyond that period of time and so the guarantee cannot help but confuse even though a careful reading of its terms might show that it states all relevant facts and even though all advertisements make the required disclosures.

(g) Literally speaking, some benefit may be claimed for the remainder of the owner's life after the expiration of the 20-year period, for the seller will still assume 10 percent of the cost of materials. But this would appear to be more a matter of form than substance. The owner would be given a mere pittance in order to furnish some color of justification for the claim that the guarantee is for a lifetime. The situation is that the owner must pay more than 90 percent of all costs in order to receive the benefit of the remaining 10 percent of the cost of materials, which does not leave him with anything of substantial value to justify the representation of lifetime warranty. In the Commission's view, the purchaser must be afforded something of substantial value for his lifetime in order to support the representation and the Commission did not feel that less than 10 percent of all costs was of substantial value.

(h) Finally, the Commission noted that the proposed guarantee excludes damages resulting from normal weathering of surfaces. In view of the fact that this appears to be the most prevalent cause for repainting aluminum siding, the Commission also advised that this is a material term or condition which not only should be set forth in the guarantee for whatever period of time it runs, but also should be clearly and conspicuously set forth in all advertising which mentions the guarantee.

[31 FR 14393, Nov. 9, 1966]

§ 15.101 Recipe promotional plan.

(a) The Commission announced it had given conditional approval to the use of a tripartite recipe plan promoting the sale of food products.

(b) According to the terms of the proposed plan, the promoter will install a dispensing machine (approximately 13 inches square) in each retail grocery store containing a sufficient number of recipe cards to meet the demands of its customers. In addition to containing a recipe of the week, the card will also feature the specific brand name of one of the ingredients of the participating food suppliers.

(c) Each participating retailer will be paid $10 per month and furnished with posters and shelf markers publicizing the recipe cards and products of the participating manufacturers. Cost of the plan will be borne by the participating manufacturers. Notification of the plan will be by a printed promotional piece and/or letter to be mailed to all retailers in an area which was not defined with exact precision.

(d) In its opinion the Commission said that sections 2 (d) and (e) of the Robinson-Patman Act "require a supplier to treat all of his competing customers on a nondiscriminatory basis, which means that if the supplier furnishes promotional assistance to one customer he must make that assistance available on proportionally equal terms to all competing customers. The courts have also held that the supplier must comply with these provisions of the law irrespective of whether the promotional assistance is furnished to the retailer directly or through an intermediary."

(e) The three conditions which must be met before the Commission can give its approval to the plan are as follows:

(1) "First, the plan must be offered to all competing retailers within a given marketing area. Under the facts outlined in your letter, there appears to be an indication that the plan, as presently contemplated, may be of-

fered only to those competing retailers within an arbitrarily drawn geographical area."

(2) "Second, the plan must be offered to all competing retailers within that marketing area. Competing retailers located on the periphery of said market areas are considered by the Commission to be included within the marketing area if in fact they do compete with those therein who are offered participation in the plan."

(3) "Third, the plan must be made available to all competing retailers irrespective of their functional classification. It appears that grocery stores will be the principal beneficiaries of the plan. However, if the items involved in the plan are also sold by nongrocery stores, they must be accorded the same opportunity to participate in any promotional assistance given by the suppliers to competing grocery outlets."

[31 FR 14520, Nov. 11, 1966]

§ 15.102 Disapproval of proposed weight-reducing claims for garments.

The Federal Trade Commission, basing its action on scientific information available to it and on its knowledge and experience, advised a manufacturer of plastic slimming garments that the Commission had reason to believe that proposed advertising and representation to the effect that these garments, through inducing perspiration, would effectively cause weight reduction, or spot weight reduction in preselected body areas or reducing generally, would be actionable under section 12 of the Federal Trade Commission Act.

[31 FR 14520, Nov. 11, 1966]

§ 15.103 [Reserved]

§ 15.104 Approval of descriptions to be used by exclusive seller to U.S. Government.

(a) The Federal Trade Commission advised a manufacturer's representative that in connection with its firm name it might properly describe its office as a "Government Sales and Contract Office," that it might in its promotional literature describe those of its products specifically designed for and sold only to the U.S. Government as "Model No. ——G, designated exclusively for and sold only to the U.S. Government (or thus and so agency)," and that it might properly state on labels affixed to the machinery which it sells that "equipment parts and service are supplied by * * *" (whoever is the supplier).

(b) The advice given was predicated on assurances by the manufacturer's representative that his company sells exclusively to the U.S. Government, that the company's promotional material is sent only to, and is generally available only to, U.S. Government agencies, and that the company is the sole source for parts and service for certain of the products which it sells.

[31 FR 15238, Dec. 6, 1966]

§ 15.105 Foreign origin chemicals.

The Commission issued an Advisory Opinion to the effect that it would be improper to label chemicals composed of 45 percent imported and 55 percent domestic product as being of domestic origin, unless an equally clear and conspicuous disclosure was made that 45 percent of the product was imported.

[32 FR 135, Jan. 7, 1967]

§ 15.106 Film projector promotional plan.

(a) The Commission announced it could not give its approval to a three-party promotional plan, which involved the placing of a film projector in grocery stores to advertise certain food products, because it contained two provisions which would probably be in violation of the law.

(b) According to the terms of the proposed plan which were submitted by a third-party promoter, the entire cost of the plan will be borne by participating food suppliers. Each retailer who participates in the plan will be paid on a sliding scale for the space occupied by the film projector, depending upon the amount of floor space in the entire store. The reason advanced for the basing of payments upon floor space is that, overall, larger stores will attract more customers and hence more viewers of the projected ads.

(c) In order to induce customers to look at the projected ads, each person entering the store will be given a card containing a number which, if it turns out to be the lucky number, entitles the holder to a prize regardless of whether the holder makes a purchase in the store. However, if the holder of the lucky number has in his shopping cart one or more of the products advertised on the film projector, he will receive a "bonus prize on occasion" in addition to the regular prize.

(d) In its opinion the Commission said that sections 2 (d) and (e) of the Robinson-Patman Act "require a supplier to treat all of his competing customers on a nondiscriminatory basis, which means that if the supplier furnishes promotional assistance to one customer he must make that assistance available on proportionally equal terms to all competing customers. The courts have also held that the supplier must comply with these provisions of the law irrespective of whether the promotional assistance is furnished to the retailer directly or through an intermediary."

(e) Commenting upon specific features of the plan, the Commission said that it contained two features which would probably violate the law.

(1) "The Commission is of the opinion that the standard of payment to retailers, which you contemplate basing upon floor space, does not meet the statutory standard of 'proportionally equal terms' as required by sections 2 (d) and (e) of the Robinson-Patman Act. The proposed standard bears no ascertainable relation to the volume of business which any of the retailers involved might conduct with any of the participating suppliers. Moreover, the proposed standard could result in a situation in which retailers who have a small volume with the participating suppliers would receive more than competing retailers with a much larger volume solely because of larger floor space.

(2) "The Commission is of the opinion that the feature of the plan which induces customers to view the projected ads constitutes the sale of merchandise by means of a lottery or by means of a chance or gaming device contrary to public policy and the provisions of sec. 5 of the FTC Act."

(f) The Commission's opinion also pointed out that, if the plan is revised so as to eliminate the two foregoing objections, it would still be necessary for the following four conditions to be met:

(1) All competing retailers must be notified of their right to participate in the plan on a nondiscriminatory basis.

(2) It must be made available to all competing retailers within a given marketing area and to those who, geographically, are on the periphery of that area if they in fact compete with the favored retailers.

(3) It must be made available to all retailers who compete in the resale of the supplier's product, irrespective of their functional classification. Therefore, if the items involved in the plan are also sold by nongrocery stores, they must be accorded the same opportunity to participate in any promotional assistance given by the suppliers to competing grocery outlets.

(4) An alternative plan on proportionally equal terms must be offered to those retailers who, for practical business reasons, find the film projector not to be usable and suitable.

[32 FR 135, Jan. 7, 1967]

§ 15.107 Labeling of product composed of leather fibres.

(a) The Commission was requested to furnish an advisory opinion with respect to the use of the terms "Reconstituted leather" and "Man-made leather" to describe a material composed of 70 percent leather fibre with bonding agents added and a vinyl backing resembling leather.

(b) In its opinion, the Commission advised that neither term would be considered as a satisfactory description of the material. The word "leather" has long been held to constitute a representation of top grain leather, unless properly qualified to show otherwise. In this connection, the terms "reconstituted" and "man-made", which at best create inferences of leather which has been in some manner reprocessed, were not considered by the Commission as adequate qualifications when the material in question is nothing more than ground leather or leather fibres held together by bonding agents.

(c) The Commission advised that if the seller wished to show the leather fibre content of this material, it would be necessary to use such terms as "shredded leather" or "pulverized leather," together with a disclosure of the vinyl backing, in order to give the consumer a truthful description of the true nature of the material.

(d) Further, if the seller decided not to disclose the ground leather or leather fibre composition of the material, the Commission stated that it would be necessary to disclose that the material was "Not leather" or "Imitation leather" or "Simulated leather," the reason being that the consumer is entitled to a disclosure that the material before him which has the appearance of leather is not actually what it appears to be.

[32 FR 382, Jan. 13, 1967]

§ 15.108 Holding company ownership of both auto parts warehouse distributor and auto parts jobber.

(a) The Commission advised a requesting party that his proposed reorganization of properties which he owns or controls would not appear to violate the Clayton Act, as amended by the Robinson-Patman Act.

(b) The requesting party proposes to establish a holding company which would control two operating companies, one an automotive parts warehouse distributor, the other an automotive parts jobber. Two officers of the operating companies will initially hold a minority interest in these companies, an interest which might become a majority interest at some future date. The warehouse distributor will equitably sell to all jobbers who wish to buy from it, except that this distributor will not sell to the jobber with which it has common ownership except on a limited emergency basis.

[32 FR 383, Jan. 13, 1967]

§ 15.109 Use of manufacturers' list prices to denote value.

(a) A concern engaged in the distribution of premiums for sellers who make premium offers on the labels of their merchandise recently requested an advisory opinion concerning the legality of using manufacturers' list prices as the value of the items so offered.

(b) After advising that it is impossible to give a categorical answer to such a question since the answer is wholly dependent upon facts which are unknown to the Commission, the Commission advised that in no case could the company or its accounts rely completely upon manufacturers' list prices as an absolute indication of the value of the products offered as premiums. Instead, since these prices will be described as the value of the premiums on labels and in advertising, they must meet the test of Guide II of the Commission's Guides Against Deceptive Pricing, which provides that whenever an advertiser represents that he is selling below the prices being charged in his area for a particular article, he should be reasonably certain that the higher price he advertises does not appreciably exceed the price at which substantial sales of the article are being made in the area.

(c) The Commission advised that if the sales history of any particular product can meet this test then the list price can be used as the value of the product on labeling and in advertising. If it does not meet this test, then the list price cannot be so used. The important point to remember here is that the mere fact that a manufacturer has asserted that a given amount is his list price does not constitute a license to others to use that price as a representation of value. The concept of value is not abstract, but must instead be based upon concrete selling prices. Certainly, the Commission stated, if the list price for any particular product can meet the test of substantial sales in the seller's trade area, it can be used as a representation of value even though substantial sales are also made at less than that price by other dealers in the same area.

(d) Additionally, the opinion pointed out that since the company was handling what was described as self-liquidating premiums, there was also the possibility that some of the list prices being employed were old in point of time and did not represent current values. In such a situation, it would not be permissible to use the list price as a basis for a representation of current value.

(e) Finally, the Commission noted that the company was not itself engaged in advertising these prices, but was instead expected to furnish values for the products to the accounts which they could use in their own advertising and labeling. The responsibility for the truthfulness of the price representations made under these circumstances was held to be twofold, being shared by the sellers which actually use the prices in their advertising and labeling and by the distribution company as well under the principle that one who places in the hands of others the means and instrumentality of deception is himself guilty of deceit. Thus it was stated to be important for both to make certain that the prices used to represent the values of these premiums comply with the criteria of the Guides.

[32 FR 787, Jan. 24, 1967]

§ 15.110 Agreement among retailers for uniform store hours.

(a) The Commission was requested to furnish an advisory opinion with respect to a proposal by a retail trade association to conduct an informal survey of a number of grocery operators in the area to determine their individual preferences as to hours of doing business. Upon completion of the survey, the association plans to announce the results thereof. Although a majority of store operators may elect thereafter to operate on uniform hours, as determined by the survey, no sanctions are planned nor will there be any attempt to enforce or insure uniformity of closing hours. There are a number of stores which will not subscribe to such a suggestion and will remain open at other times.

(b) The Commission stressed its understanding that while a majority may voluntarily elect to subscribe to uniform hours of doing business as a result of the survey of individual preferences, those who do not wish to do so will not be subject to any form of coercion or compulsory process and, indeed, it was expected that many will not so subscribe for business reasons of their own. On the basis of this understanding and assuming that the agreement or plan will relate to nothing other than hours of doing business, the Commission advised that it did not believe the plan would violate any laws it administers.

[32 FR 788, Jan. 24, 1967]

§ 15.111 Functional discounts unlawful whenever an adverse effect on competition results therefrom.

(a) The Commission issued an Advisory Opinion to the effect that the 14 percent discount which would be offered under the plan outlined below probably would result in violation of Commission administered law.

(b) At present, the manufacturer sells his product to manufacturers of a complementary product exclusively. The purchasing manufacturers resell the product to independent distributors and to ultimate consumers.

(c) The selling-manufacturer proposes to sell independent distributors direct, charging them approximately 14 percent more than the purchasing-manufacturers would be charged on shipments to the warehouses of the latter. On drop shipments to purchasers buying through the purchasing-manufacturers, the manufacturers would be charged the independent-distributors' price. On drop shipments to consumers of the product, the independent-distributor price would be charged. Drop shipments could be ordered by any customer and would be openly available to all on the same terms.

(d) There would be no agreement between purchasing-manufacturers or distributors and the manufacturer as to prices the former would charge; however, the manufacturer does now suggest and would continue to suggest prices to be charged consumers. No other form of control over resale of the product is now or would be exercised by the manufacturer.

(e) The Commission pointed out that the price difference which would result from the proposed discount is within the purview of section 2(a) of the Robinson-Patman amendment to the Clayton Act. Section 2(a) provides, in essence, that it is unlawful for a seller in commerce to discriminate between different purchasers of goods of like grade and quality where the effect may be substantially to lessen competition or to tend to create a monopoly.

(f) The Commission added that the 14 percent discount to be offered to purchasing-manufacturers is a functional discount and that such discounts are not prohibited by the applicable law or judicial interpretations thereof unless the discounts result in the adverse competitive effects the law proscribes. The Commission was of the view that such adverse effects were likely to result due to the fact that purchasing-manufacturers would compete against distributors in selling to ultimate consumers and the manufacturers would enjoy a 14 percent price advantage on such sales. The Commission pointed out that unless the 14-percent only made due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which the tile cement would be sold or delivered to the manufacturers, substantial anti-competitive effects probably would result from implementation of the plan. Such a result would be violative of section 2(a) of the Robinson-Patman amendment to the Clayton Act.

[32 FR 1171, Feb. 2, 1967]

§ 15.112 Foreign origin disclosure not required on outside of packaged badminton sets.

(a) In response to a question involving the sale of badminton sets which will be sold in an opened display case with the foreign country of origin marked on each imported component readily visible to prospective purchasers, the Commission ruled that it would not be necessary to disclose the foreign origin of each imported component on the outside of the package.

(b) The company which requested the advisory opinion intends to merchandise badminton sets to various department stores throughout the United States. The package, instructions for use and the steel poles will be manufactured here in the United States. The remaining three items in the sets will be imported from three different foreign countries and each will be marked as to its specific country of origin. For example, the rackets will be imported from Japan, the shuttlecocks from England, and the net from Pakistan. The badminton sets will be sold in an opened display case with the country of origin marked on each imported component readily visible to prospective purchasers.

[32 FR 1171, Feb. 2, 1967]

§ 15.113 Premerger clearance.

(a) A small manufacturer of a product used in the paper industry applied for clearance of the sale of 67 percent of its stock to another small company in the same line of business. There was strong competition in the line of business, a few companies dominated the market, and the selling company had had net losses for a number of years.

(b) The Commission advised the applicant proceedings would not be initiated if the acquisition was made.

[32 FR 2844, Feb. 14, 1967]

§ 15.114 Retail discount selling organizations.

(a) The Commission recently advised the promoter of a membership organization of retailers which would grant discounts on purchases and services except where prohibited by law that the plan was unobjectionable. More specifically, the plan provided:

(1) The promoter would set up a discount program for independent retailers such as auto dealers, appliance, furniture, and clothing stores. Chain stores and other discount houses would not be admitted to membership.

(2) For $5 per week for 26 weeks or 6 months, the retailer would become a member of the organization. There would be no fee for consumer-members to join. The promoter would guarantee retailers 30,000 discount member/customers. The retailers would be listed in a book showing the discount each had decided to give on purchases and services except on "fair traded" items or where prohibited by law. There would be no coordination or combination on prices by participating retailers. A free book with customer's membership card as the cover

would be mailed to all residents in the area in which the plan is tried.

(3) Although all competing retailers would be offered the opportunity, only one retailer, the first participant in an area, in each category of business would be allowed to join in each of the various areas in which the plan is tried. Participating retailers would "cooperate" only in the sense that all give discounts to member/customers; however, if a group of retailers wished to purchase an item several sold, the promoter would order the item direct from manufacturers, distributors or importers with whom the promoter has business connections.

(b) The Commission advised the applicant that the plan itself is unobjectionable. The Commission added however that:

(1) The participating retailers should grant the discount off the manufacturer's suggested price, where there is one and where a number of the principal retail outlets in the area are regularly engaged in making sales at that price; or off the usual trade area price so that the consumer will in fact receive a discount.

(2) The booklet listing participating retailers should note that listing does not imply that other businesses in the community do not offer similar or even greater discounts and that the listing of the retailer is done for a fee.

(3) If participation in the plan results in agreement as to prices, discounts, terms of sale, and the like, such agreement or agreements would be violative of Commission administered law.

(4) If the literature you use in seeking to persuade retailers or consumer-members to participate actually does or has the capacity to mislead or deceive, it would be actionable under Commission administered law.

(5) If implementation of the plan results in discriminatory acts which may substantially affect competition, same would violate the Robinson-Patman Amendment to the Clayton Act.

[32 FR 3387, Mar. 1, 1967]

§ 15.115 Trade association code of ethics governing pricing and selling practices.

(a) The Commission rendered an advisory opinion to a trade association of jobbers advising that while some of the submitted Code provisions appear innocuous, the Code as a whole is shot through with anticompetitive implications.

(b) The Commission pointed out, by way of examples, that the question of establishing fair and adequate profit levels is not an appropriate trade association exercise; the use of price as an economic weapon is integral to the competitive process and becomes anticompetitive only when used destructively; urging the frequent checking of competitive prices suggests an attempt of achieving price uniformity; complaining to a competitor about his practices could be construed as an unfair method of competition depending upon the practice involved for if the "practices" were low prices, the complaint could be construed as an appeal for price maintenance.

(c) In disapproving the Code of Ethics as submitted the Commission advised that because the effect of issuance of such a Code would be coercive upon the members, the cumulative effect of its provisions could well operate to reduce or eliminate price competition and impair the right of each member to price and promote his products as he sees fit.

[32 FR 3818, Mar. 8, 1967]

§ 15.116 Advertising claim: "America's most warranted * * *".

(a) The Commission advised a manufacturer who wished to use the advertising claim "America's most warranted * * *" that it would be inappropriate and impracticable for it to give the desired advisory opinion.

(b) Citing § 1.51 of this chapter, the Commission stated that the proposed claim was such that an informed decision thereon could be made only after extensive investigation, clinical study, testing, or collateral inquiry.

(c) If the statement in question is true, the Commission added, then of course there is nothing in the statutes which it administers to prohibit its use. The question, however, is enormously complicated and to answer it would require both quantitative and qualitative determinations which could only be made after extensive investigation. While the Commission must of necessity investigate the use of extravagant claims, such investigation should not be initiated in support of an advisory opinion.

(d) Moreover, because of the nature of the proposed claim, Commission approval could be construed and exploited as Government endorsement.

[32 FR 3818, Mar. 8, 1967]

§ 15.117 Misrepresentation of hand cream.

(a) The Federal Trade Commission advised a marketer of hand cream that it would be improper and a violation of Commission administered law to represent, contrary to fact, that the product had been "medically prescribed."

(b) There are many precedents for the proposition that it is an unfair trade practice to misrepresent approval or endorsement of products by medical associations, doctors, dentists, and related professional groups.

[32 FR 4308, Mar. 21, 1967]

§ 15.118 Reduced price on shopper's guide advertising for radio advertisers.

(a) The Federal Trade Commission advised a radio station that it might properly give reduced advertising rates in a printed shopper's guide which it plans to publish to those advertisers buying radio time at regular station rates.

(b) The Commission was informed that radio advertisers would not be required to buy shopper's guide space, and that shopper's guide space could be purchased at regular shopper's guide rates by those not buying radio time.

(c) Three other radio stations and two newspapers are available to advertisers within the market area in question.

[32 FR 4569, Mar. 28, 1967]

§ 15.119 Trade association code of ethics.

(a) The Commission advised a trade association that the objectives sought by its proposed code of ethics appeared to be unobjectionable and that adherence to the code should not operate to effect an unreasonable restraint of trade. Accordingly it is the Commission's view that the mere act of becoming a member of the association and joining in its activities for the purposes outlined will not in itself violate any statute administered by the Commission.

(b) The association was advised, however, that if enforcement of the code operated so as to effect an unreasonable restraint of trade, serious questions would be raised as to the plan's validity. The general test, the Commission stated, is whether concerted action by competitors unreasonably affects a businessman's ability to compete. Thus, if association membership is an important competitive factor, arbitrary or discriminatory refusal of membership to a qualified applicant because of alleged failure to abide by the code would raise serious questions under Commission-administered law, as would arbitrary or discriminatory expulsion of association members.

(c) In conclusion, the Commission noted that it confined itself in its answer to so much of the question as falls within Commission jurisdiction. The extent, if any, to which another Government agency may be concerned with the association's activity is a matter to be determined by reference to that agency.

[32 FR 5620, Apr. 6, 1967]

§ 15.120 Permissible period of time during which new product may be described as "new".

(a) The Commission was requested to render an advisory opinion as to the permissible period of time during which ad advertiser could continue to describe a new product as being "new".

(b) The Commission pointed out that the word "new" may be properly used only when the product so described is either entirely new or has been changed in a functionally significant and substantial respect. A product may not be called "new" when only the package has been altered or some other change made which is functionally insignificant or insubstantial.

(c) Assuming that a particular product could truthfully be described as "new" in the first instance, the opinion noted that there is little precedent for determining how long an advertiser may truthfully continue to describe it as "new". The Commission stated it was aware, of course, that the word has been frequently abused and that it is in the interest of all advertisers to have established ground rules for its use. However, the time period during which a particular product may be called "new" will depend upon the circumstances and is not subject to precise limitations; any selection of a fixed period of time or a rigid cut-off date would have to be arbitrary in nature. Further, any such attempt would not only fence in all advertisers without regard to the circumstances, but would fence in the Commission as well, and deprive it of all flexibility in dealing with individual situations.

(d) Instead, the Commission felt it would be preferable, considering the absence of precedents, to establish a tentative outer limit for use of the claim, while leaving itself free to take into consideration unusual situations which may arise. Thus, the Commission's position was that until such a time as later developments may show the need for a different rule, it would be inclined to question use of any claim that a product is "new" for a period of time longer than 6 months. This general rule would apply unless exceptional circumstances warranting a period either shorter or longer than 6 months were shown to exist.

[32 FR 6023, Apr. 15, 1967]

§ 15.121 Resale price maintenance of books held on consignment.

(a) The Commission was requested to render an advisory opinion concerning the legality of an agreement between a university press and a scholarly association that the press would not sell the annual publication of the association, which it held on consignment, at less than the minimum resale price stipulated by the association. The book normally sells by mail order for the same amount as is charged by the association for annual dues. Members of the association are entitled to receive a copy of the book at no extra charge. The association wishes to include a provision in the contract prohibiting the press from selling to educational institutions, mainly libraries, at any discount below the usual retail price, its purpose being to prevent such buyers from obtaining the book at a lower price than they could by joining the association. This would mean that the press could not give libraries the normal trade discount.

(b) In addition, the Commission was assured that the relationship between the press and the association was strictly one of agency. The press does not print the books for the association, which subcontracts the printing and simply wishes to use the selling facilities of the press to handle sales to nonmembers. Legal title to the books remains in the association, which owns the copyrights, and the books are being handled by the press on a consignment basis.

(c) The Commission advised that it could see no objection to the inclusion of this provision under the precise factual situation presented. In arriving at this conclusion, the Commission stated that it was mindful of the fact that consignment agreements can, under certain circumstances, be used as a device for illegal resale price maintenance, even where patented or copyrighted articles are involved. However, it was of the opinion that this proposal would not fall within that category in view of the fact that the contemplated consignment agreement containing the clause in question will be with only one consignee and there will be no other outlets competing in the distribution of these books. This view of the law was limited solely to the factual situation involved. Hence, generalizations from this opinion or its extension to other factual situations would not be warranted.

[32 FR 6362, Apr. 22, 1967]

§ 15.122 Propriety of publishing marketing area price lists.

(a) The Federal Trade Commission advised a manufacturer who had requested an advisory opinion that there is nothing inherently illegal about area price lists which make only due allowance for differences in the cost of shipment and delivery.

(b) The Commission advised the manufacturer further that price discriminations in sales to customers located in different areas who in fact compete with each other could amount to conduct in violation of section 2(a) of the Clayton Act, unless cost justified or unless the lower price is a good faith meeting of a competitor's equally low price.

(c) The Commission also pointed out that it could be unlawful if area price lists permitted sales producing monopoly profits in one area to subsidize sales at much lower prices in another area or to a particular customer or group of customers to the competitive injury of a competitor of the seller.

[32 FR 6362, Apr. 22, 1967]

§ 15.123 Selling merchandise by lottery methods condemned by Commission.

(a) The Commission issued an advisory opinion in which it ruled that a proposed plan calling for the sale of merchandise by means of a lottery would be contrary to the provisions of section 5 of the FTC Act.

(b) "Moreover," the Commission said, "the fact that the purchaser receives something of value for his consideration does not negate the existence of a lottery."

(c) Under the terms of the proposed plan which was the subject of the advisory opinion, the promotion would consist of a store display carton containing 36 $1 plastic scale model kits, with a different number to be marked on the end of each kit box. The display header would announce to prospective purchasers they could win a $2 chrome plated model if the number on the end of the box corresponds with the number to be posted by the store manager in 4 weeks.

[32 FR 6929, May 5, 1967]

§ 15.124 Agricultural cooperatives may market their products through a common sales agent.

(a) In an advisory opinion the Commission stated that agricultural cooperatives formed under pertinent provisions of the Capper-Volstead Act may establish and market their member's products through a common sales agent.

(b) Counsel for the requesting parties described his clients as cooperative associations of milk producers representing some 361 farmers and dairymen who produce about 2 million pounds of milk per month in excess of that consumed in their trading area. Counsel said that formation of the sales agency by his clients will enable them to dispose of this excess through bidding on Government contracts to supply milk to military bases in competition with milk now imported from other milk marketing areas for that purpose.

(c) The Capper-Volstead Act (7 U.S.C. 291, 292) permits persons engaged in agricultural pursuits to associate in the collective marketing of their products. Under its provisions cooperative associations formed thereunder may make contracts or agreements as will effect such purpose, and they may have marketing agents in common. The Act has been construed as a grant of immunity from the antitrust laws insofar as collaboration among members of cooperative associations are concerned. This immunity ends, however, at the point where they act, either by themselves or with other persons or entities not in this category, to restrain trade or otherwise eliminate competition at successive stages in the marketing process.

(d) In approving the formation of a common sales agency by cooperative associations of milk producers to market the products of their members the Commission advised Counsel for the requesting parties that its action "is not to be construed as approval for any practice which may be predatory in nature, may result in unlawful monopolization, may restrain commerce to the extent that milk prices are unduly enhanced thereby, nor to conspiracies or combinations between your" clients "and persons or entities not in this category."

[32 FR 6929, May 5, 1967]

§ 15.125 Agreement among retailers as to uniform store hours.

(a) The Commission was asked to render an advisory opinion as to whether it would be lawful for a trade association, after making a survey of retailer preferences as to store hours, to recommend that all stores observe the same hours, but that no sanctions would be imposed upon nonconforming retailers. The request was prompted by Advisory Opinion Digest No. 110, 32 FR 788, which the Association interpreted as having stated that the Commission found nothing unlawful in an agreement among retailers to observe uniform hours of business.

(b) The Commission pointed out that its previous opinion advised merely that there would be nothing unlawful in a retail trade association conducting an informal survey intended to determine its members' individual preferences as to hours of business, followed by an announcement by the association of the results of the survey. The Commission emphasized that its opinion was based on the premise that any number of individual retailers may elect unilaterally to adopt common hours of business. The Commission did not intend to suggest that an agreement among competing retailers with respect to uniform hours of business would be lawful. On the contrary, it was the Commission's opinion that such an agreement among competitors, while perhaps not illegal per se, would be fraught with grave risks of illegality. Conceivably, there might be some rare and most unusual circumstances in which such an agreement among competing sellers could be justified as a reasonable restraint of trade, but this seems unlikely. The fact that no sanctions or coercion are imposed upon noncomplying retailers cannot legitimatize an otherwise unlawful agreement in restraint of trade.

(c) In sum, it was the Commission's opinion that the conduct of a survey as to its members' business hours and an announcement of the results of that survey by a trade association, would not be unlawful so long as no agreement among competing sellers was involved.

[32 FR 7262, May 16, 1967]

§ 15.126 Proposed advertising for portable oxygen administrator.

(a) The Commission rendered an advisory opinion as to the legality of certain proposed advertising for a portable oxygen administrator designed for individual use.

(b) The advertising would represent that there are many emergencies that call for an immediate supply of oxygen, such as sudden heart attacks, coronary occlusions, respiratory defections, gas and smoke poisoning, drowning, electric shock, asthmatic seizures, and more. Providing oxygen the instant it is needed can, according to the advertising, make the difference between prolonging life and losing it or between complete and partial recovery. When needed oxygen must be supplied within 5 to 8 minutes to prevent brain damage. Until recently, if an emergency oxygen deficiency occurred, one had to wait for professional medical assistance and there was no way of knowing how long that would take. Now one can have a low cost portable administrator so simple to operate that any one can administer it, even to themselves. While the literature would caution in some places that all heart and respiratory conditions are not alike and thus the need for oxygen may vary widely in its application so that your doctor will have to be your guide, it would also add that the advertiser knows of no emergency situation where oxygen can do harm and it may save a life under many circumstances.

(c) The opinion pointed out that the matter presented a difficult problem to treat under the advisory opinion procedure, for the Commission has not conducted its own tests of this particular unit and hence is not in a position to comment upon every question raised by the advertising. Hence, its opinion has to be based upon such general medical knowledge as is available and be directed at the main themes of this advertising rather than at specific details.

(d) Based upon what is known of the capabilities of similar devices, the Commission advised that it could not place its stamp of approval upon advertising which holds this device out to the general public as suitable for use and capable of saving lives under all conditions specified without its having been recommended for use by a doctor familiar with the patient and without the individual for whom it has been prescribed, or his family, having been given instructions for its use. This is particularly true when it is considered that in some cases of asthma and emphysema there is a danger in the administration of oxygen without a doctor's prescription and instruction because an oversupply in these conditions can actually cause the patient to stop breathing.

(e) The opinion further added that aside from the question of danger in this specific situation of use and the general fire hazard when oxygen is improperly used or stored, the scientific evidence available indicates that without a positive-pressure apparatus, this device will accomplish little more than will mouth-to-mouth resuscitation in situations where emergency oxygen is indicated. In fact, the emergency resuscitator attachment appears to require mouth-to-mouth techniques in conjunction with the device and the evidence indicates this would only increase the oxygen a patient would receive by an insignificant amount. Positive pressure, which can only be administered by trained personnel without grave danger to the patient, is indicated for use when a patient is not breathing. If the patient is breathing he will usually inhale sufficient oxygen from the air by himself until medical help can be obtained.

(f) The fault of this advertising, as the Commission views it, is that while beneficial results can be achieved by the skilled administration of the proper amounts of oxygen when that treatment is indicated, it is deceptive to hold out to the unskilled person that he can by himself properly diagnose the patient's condition and administer oxygen in the required amounts and in the proper manner through use of this device so as to achieve the results claimed in the advertising.

[32 FR 7701, May 26, 1967]

§ 15.127 Description of raised printing as embossing.

(a) The Commission was requested to render an advisory opinion concerning the use of the terms "embossing" and "embossed" to describe raised printing or printing by the verkotype process.

(b) The process used would consist of printing the copy with a printing or lithographic press, placing it on a conveyor to send it through a verkotype machine that sprinkles powdered rosin on the wet ink and carries the copy under gas heaters which would fuse the rosin and ink, thereby creating a raised surface.

(c) The Commission advised that since embossing is generally understood to involve the distension of paper with the use of a die, the description of raised printing, including products of the verkotype printing process, as embossing would be inappropriate.

[32 FR 7702, May 26, 1967]

§ 15.128 Trade association code of ethics.

(a) A group of producers of products sold by door-to-door salesmen employed by independent sales agencies has requested a Commission opinion with respect to the legality of a proposed code of ethics to govern the practices of the agencies and the salesmen. The opinion was rendered following the second submittal of the code, which had been substantially modified as a result of conferences with the Commission's staff pursuant to Commission direction.

(b) The modified code provides for the appointment of an Administrator who will be empowered to impose fines against any of the agencies if he finds that they have authorized, condoned or in any way supported deceptive practices by their sales and collection representatives. The maximum amount of fines has been limited to an amount which in the Commission's judgment will not operate anticompetitively or in a confiscatory manner but sufficient to constitute a deterrent.

(c) Further, in the modified code the agreement between signatory agencies not to employ a person found to be a willful violator by the Administrator in a sales capacity for a period not to exceed 1 year was eliminated. In its place it is now provided that the Administrator, upon finding that a person has willfully violated the code, shall recommend that he not be employed in a sales capacity for a period not to exceed 1 year. However, it is further provided that an agency shall use its own discretion in deciding whether to follow such recommendation of the Administrator.

(d) In order for a person to be found to be a willful violator it must be determined that on three separate occasions he violated the code with knowledge that his representations were in violation of the code. Moreover, if an agency repeatedly condones or authorizes violations of the code, it may be subject to expulsion from participation in the code.

(e) Finally, in order to insure greater participation in the administration of the code by the agencies than was the case in connection with the original submittal, the code now provides that the Administrator will be responsible to a Board of Directors composed of six agencies and one producer. Of the six agencies, at least two must not be affiliated with any producer. Also, the one producer must not be affiliated with any agency. Appeals from actions of the Administrator may be taken as a matter of right to a committee composed of representatives of at least three participating agencies, at least one of which is not to be affiliated with a producer. A new committee is to be appointed each month and its members are to be rotated from among signatory agencies.

(f) The Commission advised that it had given this matter very careful consideration in view of the magnitude of the problems which confront the industry and the obvious sincerity of the industry in attempting to devise ways to cope with those problems. Even taking all these factors into consideration, however, the Commission was unable to give its approval to those sections of the code which apply to the salesmen as those sections are now written. While the code now provides that the action to be taken with respect to the salesmen found to be in violation would be on the basis of a recommendation by the Administrator rather than by agreement among the signatory agencies, the Commission believes the probable result of that recommendation would be to substantially interfere with those individuals' right of employment and their right to have their fate decided by their individual employers uninfluenced by virtually mandatory recommendations from the Administrator.

(g) However, the Commission advised that it did not believe that this would call for outright rejection of the code, since it believed the code could be amended so as to achieve the legitimate objectives of the industry without running afoul of the antitrust laws. Thus the Commission stated it was prepared to advise the industry that it could see no objection to the maintaining by the Administrator of a public record of the names and circumstances respecting a finding of a willful violation. If this modification was agreeable to the industry, so that a provision to that effect could be inserted in the code in place of the present section applying to salesmen, the Commission would have no further objection on that score.

(h) The Commission was further of the opinion, now that greater participation of the agencies had been assured, that it was possible to apply the code as now written to the producers and agencies in such a manner as not to do violence to the antitrust laws, particularly if the element of coercion could be truly eliminated insofar as the agencies were concerned when they were arriving at their decision as to whether to join or whether to remain under the code after having joined. The Commission made it clear, however, that this conclusion was a tentative one since there was little recorded experience upon which to predicate such a judgment. Therefore, the opinion was based on the understanding that there will be no coercion of any agency to subscribe to the plan, no coercion of any agency to remain in it after it has subscribed and no retaliation of any kind against any agency which does not choose to join or which subsequently elects to leave after having joined.

(i) The industry was also advised that the Commission approval extended in the opinion was given for a three year period, following which the industry should resubmit its request, and, in the meantime, the Administrator must submit reports to the Commission of each complaint which was received, considered or investigated and of each action taken. Further, the opinion was rendered with instructions to the staff of the Commission to initiate periodic inquiries after the plan had been put into effect to determine and report to the Commission as to how it is actually working.

[32 FR 7749, May 27, 1967]

§ 15.129 "Solid" and "karat" used together in describing articles composed of gold.

The Commission advised an association that the word "solid" could be used in conjunction with the karat indication of gold of 10 or more karats in fineness. For example, it would be proper to use the expression "14 karat solid gold" or "solid 14 karat gold" to describe an article which was both in fact solid and in fact made of gold 14 karat in fineness. The use of such descriptions, or appropriate abbreviations therefor, provided both factors in the description were given adequate prominence, would be unobjectionable.

[32 FR 8406, June 13, 1967]

§ 15.130 Use of words "National" and "Association" in name of proposed trade association.

(a) The Commission was requested to render an advisory opinion concerning the legality of the use of the words "National" and "Association" in the name of an association in the process of formation.

(b) The Commission was advised that a group of members of the industry had cooperated in the founding of the association, an unincorporated group. These members were active in several different States. They are now soliciting memberships from every industry member known in the United States, which exceed 2,500 in number. The purpose of the association will be to foster the well-being and growth of the industry, as is common with trade associations. Within a short time, the group expects to achieve substantial and widespread representation.

(c) The opinion advised that the Commission had considered the facts presented and the steps which the group planned to take and that it had no objection to the use of either word in the name of the proposed association.

[32 FR 8407, June 13, 1967]

§ 15.131 Acceptance of free merchandise by grocery retailer.

(a) The Commission was requested to render an advisory opinion with respect to the legality of the acceptance by a grocery retailer of offers of free merchandise from some of its suppliers. Basically, the retailer was interested in the legality of accepting an offer, in connection with the purchase of merchandise, of one case of free goods for every location the purchaser operates. According to information supplied by the requesting party, such offers are often introductory in nature, and are used by manufacturers to acquire new customers or to introduce new products. Only one free case of goods is given and the offers are generally not repeated.

(b) Under well-settled principles, the Commission advised that it was of the opinion that where a seller gives his customers free merchandise without expecting any promotional performance in return, the retailer having advised that no such performance was expected, he has in effect and in law granted a reduction in price to the extent of the value of the free merchandise. This being so, the practice of making such offers would be governed by the provisions of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, which, in brief, provides that it shall be unlawful for a seller to discriminate in price between different purchasers of goods of like grade and quality where the effect may be to substantially lessen competition or to create a monopoly and where none of the defenses afforded by the Act are present.

(c) As the buyer, the Commission advised that the retailer was governed by the provisions of section 2(f) of the Act, which would make it unlawful knowingly to induce or receive a discrimination in price which is prohibited by section 2(a). Thus the suppliers could give and the retailer could accept free merchandise under these circumstances to the same extent and in the same amounts as lower prices would be lawful.

(d) Considering the nature of the statute involved, the Commission stated that it was difficult to rule categorically with respect to any particular proposal such as presented in the context of an advisory opinion. This is especially true when it comes to measuring the competitive effects of a proposal which has not yet been placed into effect. Despite the presence of these unknown factors, the Commission felt it could offer certain comments of a cautionary nature which might be helpful to the retailer in determining whether or not to accept such offers.

(e) Under the formula which the suppliers proposed to use for determining the amount of free goods to be given each customer, namely, one free case for every location the purchaser operates, the Commission felt it was very unlikely that any of the defenses made available by the Act could be established. The only ones which seemed to have any possible application to this situation would be good faith meeting of competition and cost justification. The very statement of facts seemed to negate any question of meeting competition, for the suppliers obviously would not be reacting to any competitive situation but would instead be motivated solely by their own marketing purposes.

(f) Additionally, it was difficult for the Commission to visualize how these offers could be cost justified since cost factors obviously do not enter into the determination of the amount of free goods to be given. Quite the contrary, the amount is to be determined solely by the number of outlets which the purchaser operates, without regard to quantities ordered or differences in the cost of manufacture, sale, or delivery.

(g) If the offer is made to obtain new customers, the Commission felt price discriminations could result as between new customers who would receive varying amounts of free goods depending upon the number of outlets which they operate, or between any given new customers and competing old customers who would receive nothing under the proposal. Even if the offers were made to all customers for the purpose of introducing a new product, price discriminations could result because of the varying amounts of free goods depending upon the number of outlets which they operate. The question of whether such price differentials would have the probability of anticompetitive effect requisite to a finding of illegality under the statute would depend on the specific circumstances of the individual case. This determination cannot be made with certainty at this time. In view of the possibility of a violation of section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, the Commission is unable to give its approval to this plan.

[32 FR 9063, June 27, 1967]

§ 15.132 Giving free merchandise to obtain new customers.

(a) The Commission was requested to render an advisory opinion with respect to the legality of a proposal by a seller to give free merchandise in order to obtain new customers among retail food outlets not presently selling the products of the seller. According to information supplied by the requesting party, such offers are often introductory in nature, and are used by manufacturers to acquire new customers or to introduce new products. Only one free case of goods is given and the offers are generally not repeated.

(b) Under the proposal, for each such outlet which has from one to six checkouts, both inclusive, the seller will give one free case of each product which is purchased by or for sale through such outlet. The requisite purchase must be in case lots. For each such outlet which has seven or more check-outs, the seller will give two free cases of each product which is purchased by or for sale through such outlet and the requisite purchase again must be in case lots. For the purpose of this offer, the term "check-outs" means cash registers or other places in the outlet at which customers regularly pay for food purchases made in said outlet.

(c) The Commission advised that it was of the opinion that where a seller gives his customers free merchandise without expecting any promotional performance in return, he has in effect and in law granted a reduction in price to the extent of the value of the free merchandise. This being so, the practice would be governed by the provisions of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, which, in brief: *Provided*, That it shall be unlawful for a seller to discriminate in price between different purchasers of goods of like grade and quality where the effect may be to substantially lessen competition and where none of the defenses afforded by the Act are present. Thus the seller was advised that it could give free merchandise under these circumstances to the same extent and in the same amounts as it could grant lower prices to the recipients thereof.

(d) Considering the nature of the statute involved, the Commission went on to advise that it was difficult to rule categorically with respect to any particular proposal in the context of an advisory opinion. This is especially true when it comes to measuring in a prospective manner the competitive effects of a proposal which has not yet been placed into effect. Despite the presence of these unknown factors, the Commission did feel that it could offer certain comments of a cautionary nature which might prove helpful to the seller in determining whether or not to embark upon this program.

(e) Under the formula which the seller proposed to use for determining the amount of free goods to be given each customer, namely, one free case for each outlet with up to six check-outs and two free cases for each outlet with more than six, it appeared unlikely to the Commission that any of the defenses made available by the Act could be established. The only ones which would seem to have any possible application to this situation would be good faith meeting of competition and cost justification. The very statement of facts seemed to negate any question of meeting competition, for the seller obviously would not be reacting to any competitive situation but would instead be motivated solely by its own marketing purposes.

(f) Additionally, it was difficult for the Commission to visualize how these offers could be cost justified since cost factors obviously do not enter into the determination of the amount of free goods to be given. Quite the contrary, the amount is to be determined solely by the number of check-outs per outlet which the purchasers operate, without regard to quantities ordered or differences in the cost of manufacture, sale or delivery.

(g) If the offer is made to obtain new customers, the Commission felt that price discriminations could result as between new customers who would receive varying amounts of free goods depending upon the number of outlets which they operate, or between any given new customers and competing old customers who would receive nothing under the proposal. Even if the offers were made to all customers for the purpose of introducing a new product, price discriminations could result because of the varying amounts of free goods depending upon the number of outlets which they operate. The question of whether such price differentials would have the probability of anticompetitive effect requisite to a finding of illegality under the statute would depend on the specific circumstances of the individual case. This determination cannot be made with certainty at this time. In view of the possibility of a violation of section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, the Commission is unable to give its approval to this plan.

[32 FR 9064, June 27, 1967]

§ 15.133 Agreement among members of trade association to comply with government ruling.

(a) A trade association requested an advisory opinion as to its proposal to hold joint discussions among its members as to the proper description of the industry's product looking toward a possible agreement among all concerned to comply with the ruling of a government agency as to how the product should be labeled. The Association assured the Commission that the discussion would be for this limited purpose only and that there would be no price fixing, monopoly or other antitrust question involved.

(b) The Commission advised that there could be no objection to a discussion among the members looking toward a limited agreement to comply with this ruling on a voluntary basis. The members were further advised, however, that nothing in this opinion was to be construed as approval of any steps which might be taken by the members, acting in their private capacity, to enforce this ruling themselves as to any members who might not be inclined to agree. Such approval as was given was limited to the simple agreement in principle to comply with the ruling, with enforcement being left to the properly constituted government authorities.

[32 FR 10297, July 13, 1967]

§ 15.134 Proposed lease of patented industrial machine.

(a) A manufacturer of a patented industrial machine designed to produce a nonpatented end product requested an advisory opinion as to the legality of its proposed form of lease.

(b) The manufacturer posed two specific questions pertaining to the lease and requested an opinion as to any other phase which the Commission might feel should be covered. The first question related to the lease term and royalty provisions, which provided that the lease shall continue in effect for three years with the lessee having the right to terminate upon 90 days notice during the second and third years and that the rental shall be 2.2 percent of the gross sales of products produced on the machine by the lessee. The Commission stated that it viewed the patent grant as conveying to the patentee the right to charge whatever royalty was satisfactory to the parties, measured by whatever patented or unpatented royalty base he desired for as long a period of time as he elects, so long as there is no attempt thereby to extend the patent monopoly beyond its intended scope. Therefore, it could see no objection to three provisions as written.

(c) The second question related to the paragraph providing that the lessor will not make any sales of the equipment and will not enter into a lease agreement for such equipment with anyone else whose place of business is located within the lessee's trading area as defined in the lease. The Commission noted that this provision did not grant the licensee an exclusive territory, although it had been advised that the nature of the end product would make it difficult for anyone else to compete within that area because of the freight factor. Be that as it may, the Commission was of the opinion that the owner or holder of exclusive patent rights to make, use and sell may carve out of his grant a limited monopoly for a licensee and, therefore, it could see no objection to this provision.

(d) The Commission further noted that following discussions with the staff the manufacturer authorized deletion of one sentence in the lease for editorial purposes and that in the paragraph dealing with alterations, the manufacturer requested delegation of the sentence requiring that any alterations, improvements, or changes, which are or may be patentable, shall upon request, be assigned to the lessor. Thus the manufacturer did not request an opinion as to the required grant-back of improvement patents incorporated in the original submittal.

(e) While the Commission did not purport to pass upon the purely contractual aspects of the lease, it did state that it had reviewed the other provisions of the lease and expressed no objections thereto from the standpoint of the laws it administers, particularly in view of the fact that it had been advised that there were other competitive machines which the lessees are free to rent or purchase and in view of the fact that there were no tie-ins requiring the purchase of auxiliary or other equipment or supplies from the lessor.

[32 FR 10298, July 13, 1967]

§ 15.135 Tripartite promotional assistance plan featuring rewards to customers.

(a) The Commission was requested to render an advisory opinion concerning the legality of a tripartite promotional program featuring the sale by a promoter to grocery retailers of books in which customers can paste labels from suppliers' products and receive a cash reward depending upon the number of labels collected.

(b) Under the plan, manufacturers will be solicited for permission to show reproductions of their labels, box tops, etc., within the pages of the books at no charge. The promoter will then offer the books for sale to all retailers within the boundaries of the initial test area. The retailers can then distribute the books in any manner they choose, either by mail, house-to-house, or at their stores. They may offer them as a bonus for a certain purchase or for purchases of a specified amount.

(c) Consumers will be invited to buy and try the products shown and to paste or otherwise fasten the actual label or other product identification over the designated space in the book. The books are redeemable for cash at the issuing retailer's store and the value depends upon either the total number of product identifications returned in one type of book or whether all product identifications are returned in the other type of book. The retailer advances the cash reward to consumers redeeming books issued by him. The promoter will then reimburse the retailer the full amount advanced and in addition pay him a checking and handling fee, which will vary depending upon whether it is a completely filled or partially filled book. The promoter will then invoice suppliers based on the number of product identifications returned. This invoice will include an amount sufficient to cover the cash reward to the consumer, the fee to be paid the retailer and a payment to the promoter for his costs plus his profit.

(d) Retailers stocking all the items shown on the inside pages, or willing to do so, will be offered a choice of the two types of books. First, is the book offering a cash reward based on the number of product identifications returned. The consumer can fasten one or more of the product identifications in the book and return it to the retailer for a cash reward. Second, is the book offering a flat cash reward for completely filling the book with all identifications shown. Retailers stocking one or more of the items shown, but not all of them, will be offered the book where redemption value is based on the number of identifications returned. The consumer can make purchases anywhere and fill as many spaces as desired, regardless of limit to items stocked by the issuing retailer.

(e) Retailers using either type of book can choose from individualized covers or preprinted stock covers and will have a choice of using a name coined by the promoter or a name of their own choosing. The cost to the retailer will vary according to the type and quantity of books purchased. The promoter has advised that the differences in costs of both the standard and individualized covers is solely attributable to differences in the cost of printing and distributing different quantities and that the books are to be sold to retailers at cost.

(f) The promoter will mail an "Offer to Retailers" to all grocery stores, supermarkets, headquarters of each local, regional and national chain, wholesalers and the area headquarters or warehouses of each cooperative or association within the geographic area, as their names can be found in trade and telephone directories, route lists, etc. Realizing that some stores might be missing from these lists and also that other types of retailers might be offering at least some of the products shown, the promoter will run an advertisement in every daily newspaper within the area outlining the features of the books and offering to furnish a copy of the notice to any interested retailer. In any county where there is no daily newspaper, the notice or advertisement will be run in a weekly newspaper of general circulation.

(g) The Commission advised that while it believed the promoter had done a commendable job of devising a plan which contained alternatives which should prove to be usable in one form or another by every customer of the participating suppliers, there was still lacking the element of proportionally equal treatment of those customers as required by sections 2 (d) and (e) of the Clayton Act, as amended. In brief, these sections require that whenever a seller makes payments and furnishes services for the benefit of one customer, he must make those payments or services available on proportionally equal terms to all competing customers. If a situation such as this, where a number of suppliers will be making payments to the promoter which will inure to the benefit of their customers, the responsibility rests on the promoter and the suppliers to see that the promotional assistance thereby rendered is made available on proportionally equal terms to each competing customer of each participating supplier.

(h) The Commission's concern with this proposal stemmed first from the fact that the retailers will be charged different prices for these books depending upon the quantities ordered. In one sense, this could be viewed simply as a sale from the promoter to the retailers and thus subject to the cost justification defense which the statute make available to one charged with a discrimination in price. However, the Commission found it conceptually impossible to lift this transaction out of the whole and view it as a separate price discrimination problem. The proposal involves one essentially promotional program in which the parts cannot be separated from the whole. While it is true that the promoter will sell the books to the retailers, he will do so at cost and this would not be possible were it not for the fact that he will derive his profit from payments made by the suppliers. Thus the Commission ruled that the entire plan was keyed to payments which emanate from the suppliers and this being so all parts must be judged according to the standards set forth in section 2 (d) and (e) of the Act.

(i) This brought the Commission into confrontation with the fact that the defense of cost justification is not available to one charged with a violation of these sections. It followed, in the Commission's view, that there was no way to escape the conclusion that the smaller dealers were not being afforded proportionally equal treatment when they had to pay more for the books than did their larger competitors. The opinion acknowledged it to be true that these prices are equally available to all in that all will be charged the same price for the same quantities. But it is equally true that all will not be able to buy in the same quantities. Since the retailer's profits from this plan will equal the amount by which their payments for redeeming books exceed their cost of purchasing such books, the Commission could not view the plan as being available on proportionally equal terms so long as there is a disparity in the prices they must pay in order to participate.

(j) In this connection, the Commission made it clear that it was only concerned with the prices charged for the books with standard covers since those were the real base of the plan. The purchase of books with individualized covers appeared to be purely optional with the retailer if he cared to spend more in order to more closely identify the plan with his own store.

(k) A second respect in which this proposal was held to be deficient under the law stemmed from the fact that the large retailers were apparently to be offered both the fully completed and the partially completed book plans, while the smaller retailers were to be offered only the latter. In the Commission's view, both plans must be affirmatively offered to and made available to all retailers before the overall plan could be said to be available to all competing customers on proportionally equal terms.

(l) The opinion singled out two additional factors of the proposal which should be borne in mind if it is to be conducted within the law. The first concerned the fact that grocery retailers will be notified by mail and all other customers of the participating suppliers will be notified by advertisement. While the statute prescribes no particular method by which the availability of allowances or services is to be communicated to a seller's customers, it is clear that the duty rests upon such seller to see that all competing customers are informed. A plan can only be said to be available to a customer if he knows about its existence. If the method of notification chosen actually reaches all competing customers, there could be no objection to the plan on that score. However, the promoter was cautioned to keep in mind that the suppliers could incur liability if it subsequently developed that some did not as a matter of fact receive notice because of the method chosen.

(m) The second factor stemmed from the fact that it was proposed initially to test the program in nine contiguous counties. Even though this is a test area the promoter was advised to be careful here not to discriminate against customers located on the fringes but outside the area selected since they may be actually competing with those who are participating. In such situation, the existence of competition prevails, not geographic or political subdivisions, and the fringe area customers, if any there be, who in fact compete must be afforded an equal opportunity to participate.

[32 FR 10566, July 19, 1967]

§ 15.136 Selective leasing of shopping center space.

(a) The Federal Trade Commission was asked its views as to the legality of the following proposed course of conduct: A real estate developer plans to develop a new city composed of some 5,000 families. In connection therewith space is to be made available for business and service facilities. Prospective lessees of this space will be accepted, or rejected, in light of a statistical study purporting to show an optimum occupancy mix.

(b) The Commission advised the requesting party that, in the absence of any purpose or intent to create a monopoly, prospective lessees could be accepted or rejected at will provided the action taken was taken independently and as the result of the lessor's individual judgment.

(c) The Commission noted, however, that it expressed no views as to the propriety, under the trade regulation laws, of any agreement between lessor and lessee as to others to whom space might be leased.

[32 FR 10567, July 19, 1967]

§ 15.137 Proposed trade association discussion seeking firm price guarantees from suppliers.

(a) The Commission was requested to render an advisory opinion with respect to the legality of a user's trade association discussing and seeking a "guarantee that a quoted price will remain firm for a definite number of days" from individual suppliers or from their national association.

(b) It was represented that the product constitutes about 30 percent of the cost of doing business and that while some users buy direct, others purchase from intermediate suppliers. Regardless of the supply source, product suppliers change prices without notice and will not guarantee firm prices unless the purchase contract calls for a large quantity of the product. As users' customers demand firm price quotations on their needs and because of the normal time lapse between a quotation and actual product purchase, an interim price increase by producers results in a lessening of the users' profit. The Association added that there is no agreement not to do business with those producers who decline to guarantee firm prices, but that individual users will continue to bargain for concessions as they do at present.

(c) The Commission advised that it could neither approve nor sanction the proposed industry discussions. Though such discussion might be motivated by a purpose to remove evils affecting the industry, it appears to go further than is reasonably necessary to accomplish the desired result. Even if the discussions were accompanied by disclaimers, there is implicit therein too grave a danger that it would serve as advice whereby the concerted power of members of the local association, and even of the national association, might be brought to bear to coerce the producers, or their association, to conform pricing policies to the standard desired, or at the very least as an invitation to enter into agreements among themselves to do so.

[32 FR 12176, Aug. 24, 1967]

§ 15.138 Use of symbols and names having fur-bearing animal connotations in labeling textile fiber products.

(a) The Commission was requested to render an opinion with respect to the labeling of textile fiber products manufactured so as to simulate a fur or fur product.

(b) The requesting party proposed using a label which would bear the depiction of a fur-bearing animal commercially used in fur products, a trade name and trademark having a fur-bearing animal connotation, and the required fiber content disclosures.

(c) The Commission pointed out that the rules and regulations promulgated under authority of the Textile Fiber Products Identification Act provide, in Rule 9, that the label of a textile fiber product shall not contain a name, word, depiction, descriptive matter, or other symbol which connotes or signifies a fur-bearing animal, unless such product is a fur product within the meaning of the Fur Products Labeling Act. Subject to this proviso, a textile fiber product may not be described on the label with the name or part of a name of a fur-bearing animal, whether as a single or combination word similar to a fur-bearing animal name, for example, "Broadtail".

(d) The rules permit the nondeceptive use on textile fiber products of fur-bearing animal names but only where the animal fur is not commonly or commercially used in fur products, as for example, "Bear". Further, the rules do not prevent nor prohibit the nondeceptive use of a trademark or trade name containing the name, symbol, or depiction of a fur-bearing animal unless "the textile fiber product in connection with which such trademark or trade name is used simulates a fur or fur product."

(e) The Commission advised that it would not be proper, in the labeling of textile fiber products, to use a label bearing the depiction of a fur-bearing animal nor a trademark and trade name having fur-bearing animal connotations. Such labeling, with or without the required fiber content disclosures, of a textile fiber product manufactured so as to simulate the fur of an animal commonly or commercially used in fur products would have the tendency and capacity of inducing prospective customers into the mistaken belief that the textile fiber product to which such label is affixed contains the fur of the animal depicted or fur fibers from such animal.

(72 Stat. 1717; 15 U.S.C. 70; 65 Stat. 175; 15 U.S.C. 69)

[32 FR 12176, Aug. 24, 1967]

§ 15.139 Advertising claims for spray deodorant.

(a) The Commission rendered an advisory opinion in regard to some proposed advertising claims for a personal deodorant spray.

(b) Specifically, the Commission considered the propriety of the following two claims: (1) That the product meets the U.S. Government requirements for safety and effectiveness and (2) that no other medicated personal deodorant spray equals its safety and effectiveness.

(c) In regard to the first claim, the Commission said there were no specific standards or requirements officially recognized by the U.S. Government relating to the safety and effectiveness of personal deodorant sprays. Under these circumstances, therefore, the Commission said it would be improper to claim that such requirements exist and that the product meets those requirements.

(d) With respect to the second claim, the Commission said that opinion evidence indicated there are other medicated deodorant sprays on the market which are equally as safe and effective as the product in question. In view of this opinion evidence, and in the absence of reports of properly controlled studies establishing the validity of the claim, the Commission said that it could not give its approval to the second claim.

[32 FR 12557, Aug. 30, 1967]

§ 15.140 Advertising allowances by book publishers.

(a) The Commission rendered an advisory opinion in regard to the legality of a book publisher's promotional plan calling for the payment of advertising allowances. Specifically, the Commission ruled that the proposed plan would be in compliance with section 2(d) of the Clayton Act, as amended.

(b) Under the terms of the proposed plan, the book publisher proposes to offer to retailers, wholesalers and retailers who purchase through wholesalers advertising allowances equal to 75 percent of the actual cost for newspaper and magazine advertisements at local rates, but not to exceed 10 percent of the net value of confirmed orders for the advertised titles. Additionally, allowances will be paid for the use of stuffers, circulars and catalogs, but not to exceed 10 percent of the dealer's net purchases. Regardless of which method of advertising is used, promotional payments will not exceed 10 percent of the buyers' total net purchases.

[32 FR 12557, Aug. 30, 1967]

§ 15.141 Proposed advertising for mink oil skin lotion.

(a) The Commission was requested to render an advisory opinion with respect to proposed advertising for a skin lotion containing mink oil, which would represent that the product will relieve the scaling, itching, and redness of psoriasis and eczema.

(b) The opinion advised the advertiser that while the Commission has no objection to representations that the product will afford temporary relief of itching and scaling of psoriasis, any mention of eczema or representations in advertising that the product will relieve redness would appear to have the capacity and tendency to deceive.

[32 FR 12750, Sept. 6, 1967]

§ 15.142 Information required on label affixed to textile fiber products.

(a) The Commission was requested to render an opinion with respect to the labeling of textile fiber products manufactured so as to simulate a fur or fur product.

(b) The requesting party proposed using two labels on his products. The first would bear his trademark and trade name and would be affixed inside the neck of the garment in the conventional manner. The second, bearing the required fiber content disclosures, would be a separate tag hung elsewhere on the garment.

(c) The Commission pointed out that the rules and regulations promulgated under authority of the Textile Fiber Products Identification Act (Part 303 of this chapter) define "required information" as that which must appear on labels, and "label" as the means of identification required to be affixed on textile fiber products and on which the "required information" is to appear (§ 303.1 (e) and (f) of this chapter). The "required information" includes "the generic names and percentages by weight of the constituent fibers present" which shall be "conspicuously and separately set out on the same side of the label in such a manner as to be clearly legible and readily accessible" to a prospective purchaser (§ 303.16 of this chapter). The name to be used on such labels "shall be the name under which the person is doing business" or his word trademark if registered (§ 303.19 of this chapter).

(d) The opinion pointed out that § 303.16(b) of this chapter provides that the required name or registered identification number may be conspicuously set out on a separate label which is prominently displayed in close proximity to the label containing the other required information. However, in this instance, the Commission believed that it would not be proper, in the labeling of a textile product, to identify the product with one label bearing a trademark and trade name including fur terminology and to make the fiber content disclosure on another label or tag hung elsewhere on the product. It was the Commission's opinion that the proposed labeling of a textile fiber product manufactured so as to simulate the fur of an animal commonly or commercially used in fur products would have the tendency and capacity of inducing prospective purchasers into the mistaken belief that such product was a fur or fur product.

(72 Stat. 1717; 15 U.S.C. 70)

[32 FR 12750, Sept. 6, 1967]

§ 15.143 Promotional allowances by fabric supplier.

(a) In an advisory opinion the Commission ruled that a fabric supplier who makes advertising allowances available to one or more resellers of a finished product, irrespective of the fact that an intermediary performs work on the raw material which transforms it into the finished product, thereby adopts those resellers of the finished product as his customers and must comply with section 2(d) of the Robinson-Patman Act.

(b) Commenting further upon the customer relationship, the Commission said: "We think Congress clearly intended to ban discriminations in the form of advertising allowances, regardless of the fact that intermediaries might be interposed, where the grantor deliberately contacts hundreds of retailers directly with the purpose of expending thousands of dollars for advertising purposes. Thus where a supplier initiates such a promotional plan with retailers and has primary, if not the sole, responsibility over the control and administration of the plan, we think the customer relationship has been established and the plan must be tested in the light of the requirements of section 2(d) of the Act."

(c) Under the terms of the proposed plan, the fabric supplier would pay 50 percent of retailers' advertising costs if the retailer sells and advertises wearing apparel manufactured from a certain line of fabric, up to a total cost of 1,200 lines published in Advertising Checking Bureau (ACB) newspapers. Retailers who use non-ACB rated newspapers, radio, television, handbills, or mail stuffers will be paid an equivalent measurable cost. The plan will be made available to all retailers located in selected trading areas of all wearing apparel manufacturers who purchase and produce the finished product from the fabric in question. Only dealers who purchase apparel at regular wholesale prices will be eligible to participate.

(d) In its opinion, the Commission concluded that the plan complies with section 2(d) of the Robinson-Patman Act with two reservations. In commenting upon the first reservation, the Commission said: "The statute requires one who gives advertising allowances to make those payments available to all competing customers. Availability means that the grantor of the allowance must notify all competing customers of their right to participate in the plan. Thus the provision of the plan which requires a retailer located just outside one of the selected areas to show that he competes with one or more of the favored retailers in order to have the offer made available to him would appear to shift the responsibility of notification required under the statute. For this reason, the Commission cannot approve this particular provision of the plan should it result in discrimination against retailers located on the periphery of the selected trading areas.

(e) With respect to its second reservation, the Commission said that its opinion should not be construed as implying approval of the phrase "at regular wholesale prices" if the practical effect of that language is to procure resale price maintenance.

[32 FR 12941, Sept. 12, 1967]

§ 15.144 Proposed license agreement for process patent.

(a) The Commission rendered an advisory opinion in which it informed the owner of patented process for preparing food that it could see no objection to the form of a proposed licensing agreement with the food processing industry.

(b) The proposed agreement, which was the only form of agreement to be used, was described as nonexclusive in nature and provided for the licensees to use the process and machinery at one uniform rental rate regardless of the physical location of the licensee. Although the process patent contemplates the use of the machinery and the agreement contemplates use by the licensees of that machinery, there is no absolute requirement that the licensees use any particular machinery in connection with the process.

(c) The hourly rental to be charged all licensees was to be measured by a meter attached to the machine and the licensor reserved the right to cancel the license if the annual rental due from operation of the machinery fell below a stated minimum amount, unless the licensee paid the difference between the actual rental due and the required minimum. The duration of the agreement was to be for a period of 5 years.

(d) The Commission advised that while it did not purport to pass upon the purely contractual aspects of the agreement, it could see no objection to the form of the agreement from the standpoint of the laws it administered, as distinguished from matters pertaining to the implementation thereof.

[32 FR 13635, Sept. 29, 1967]

§ 15.145 Aggregating purchases of multiunit organizations.

(a) The Commission rendered an advisory opinion in which it concluded that it would not be permissible under section 2(a) of the amended Clayton Act to aggregate the purchases of three centrally owned retail grocery stores for the purpose of cost justifying a lower price to those stores.

(b) "The reason for this," the Commission said, "is that discounts to multiunit purchasers must be cost justified on a store-by-store basis where, as here, each store orders separately, receives separate delivery and is invoiced separately."

(c) Concluding its opinion, the Commission said: "Since independent and singly owned retail stores are served in identically the same manner, it would confer an advantage on the multiunit store, not by virtue of any savings in cost to the store but solely by reason of its membership in the centrally owned organization. Combining or aggregating purchases, therefore, for the purpose of determining costs of a multiunit organization is not related to the realities of the market since the independent or singly owned store competes with the individual stores of the chain organization."

(d) The particular facts in the advisory opinion involved three centrally owned retail grocery stores. Each store placed separate orders with the wholesaler, had its goods delivered separately and was invoiced separately. In addition, some singly owned stores bought in larger volume than the smallest store which belonged to the centrally owned organization.

[32 FR 14323, Oct. 17, 1967]

§ 15.146 Request for revision of advisory opinion pertaining to use of the word "new".

(a) The Commission was requested to reconsider and revise its advisory opinion as to the permissible period of time during which an advertiser may continue to describe a new product as being "new". The opinion in question was announced in Advisory Opinion Digest No. 120 (§ 15.120) and took the position that until such time as later developments may show the need for a different rule, the Commission would be inclined to question use of any claim that a product was new for a longer period of time than 6 months.

(b) The request was that the Commission revise this opinion to omit specifying any time limit or, in the alternative, to specify a period of at least 1 year, with the same proviso as was written into the present opinion that exceptional circumstances may warrant a longer or shorter period. In response to this request, the Commission stated its basic conclusion that the general rule announced in the opinion, which was announced as the rule which would be followed until later developments might show the need for a different rule, has not been in existence long enough for the accumulation of any additional experience which would indicate the need for a change at this time.

(c) However, the Commission did take note of the argument that 6 months is not adequate time for test marketing new products, which are usually tested in areas representing between 1 percent and 15 percent of the population and run for an average of 6 months to 2 years. In this regard, the Commission advised that the 6 months rule announced in its previous opinion does not apply to the bona fide test marketing of a new product. So long as the test marketing program does not cover more than 15 percent of the population, so long as the test period does not exceed 6 months in duration and so long as it is being conducted in good faith for test purposes only, the Commission stated that it did not intend to apply the 6 months rule until the test period had ended and the product had been introduced to the general market.

(d) The requesting party had further contended that the time selected was not long enough to cover the average life of packaging materials and advertising literature and thus would necessitate scrapping such materials after the time had expired. With respect to this point, the Commission stated that while it was always anxious to minimize such losses to advertisers whenever it could do so consistently with its duty to protect the public from deception, it would seem that here the advertiser is peculiarly in control of the situation and able to protect himself against being caught with a large inventory of such materials on hand.

(e) When an advertiser introduces a new product to the market he is at that time on notice that the claim "new" can remain valid for only a temporary period of time and he is at that time charged with the responsibility of preparing only so much material containing the words as can be used within the period of time during which the product can accurately be described as new. Even granting that one cannot predict with mathematical accuracy how fast the inventory will be consumed, still one experienced in such matters should be able to predict with reasonable accuracy how much will be needed for 6 months use and be prepared to discontinue use of such material at the end of that time without the loss of significant amounts.

(f) Finally, the Commission stated that it had announced in its first advisory opinion on this subject (Advisory Opinion No. 120) that shorter or longer periods of time would be considered for particular products upon a showing that such different period was more appropriate for the product in question. No such showing had been made on this application warranting the Commission to make any change in its announced time period.

[32 FR 14693, Oct. 24, 1967]

§ 15.147 Granting of "back-haul" allowances to customers picking up their own orders.

(a) The Commission rendered an advisory opinion advising a manufacturer of food products that it would probably be illegal to grant so-called "back-haul" allowances to customers who pick up their own purchases at the manufacturer's warehouses.

(b) The manufacturer in question presently sells its products on a delivered price basis with bracket pricing and does not permit customers to pick up products at warehouses or plants. Customers with trucks returning empty to their warehouses along routes near the manufacturer's warehouses and plants are now demanding the opportunity to pick up products and to earn an allowance by so doing. Consequently, the manufacturer proposed to institute a program whereunder customers would be permitted to pick up products and be paid an allowance equal to the amount the manufacturer would otherwise have to pay a common carrier to deliver to the customer.

(c) The Commission advised that the proposal was governed by the provisions of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, which, in brief, provides that it shall be unlawful for a seller to discriminate in price between different purchasers of goods of like grade and quality where the effect may be substantially to lessen competition or to create a monopoly and where none of the defenses afforded by the Act are present. Considered in the light of this statute, the Commission concluded that, assuming the presence of all the other elements necessary to a determination of a violation of the statute, the implementation of this proposal would probably result in a violation of the law. This result seemed to the Commission necessarily to flow from the use of a delivered pricing system, for in such a case the freight factor included within the price is not the actual freight to any given point, but an average of the freight costs for all customers within the zone wherein the delivered price is quoted, or, at least, a figure determined by some formula apart from actual costs. If one customer is then given a "back-haul" allowance for the actual freight saved, the opinion advised serious possibility of discrimination would exist in any delivered pricing system and it is highly doubtful that the defense of cost justification, at least, would be available.

(d) While this conclusion may seem unreasonable from one point of view, since the allowance would be for no more than the actual freight saved, it seemed to the Commission to be a necessary result of using a delivered pricing system. Whenever such a seller departs from his delivered prices for the benefit of one customer, he leaves himself open to a charge of discriminating against his other competing customers who order in the same quantities and hence fall within the same pricing bracket because he failed to make allowances for the individual cost factors present in their situations. The law does not require that a seller pass on his cost savings to his customers, the Commission stated, but where he elects to do so in one instance it does require that he not discriminate between his purchasers where such discrimination has the proscribed adverse effect on competition.

[32 FR 14694, Oct. 24, 1967]

§ 15.148 Corsage wearing apparel under Flammable Fabrics Act.

(a) The Commission was requested to render an advisory opinion as to whether a corsage made of wood fiber chips is considered to be wearing apparel under the Flammable Fabrics Act.

(b) The Commission has advised the requesting party that in its opinion a corsage made of wood fiber chips is an article of wearing apparel as the term "article of wearing apparel" is defined in the Flammable Fabrics Act, and is subject to the Act.

[32 FR 15470, Nov. 7, 1967]

§ 15.149 Payment for recruiting new students.

The Commission advised a school that it might properly offer and pay a stated sum of money to present students under the following circumstances: At, or near, the conclusion of a course of instruction students would be supplied with cards recommending the school for distribution to their friends. When and if a recipient of one of the distributed cards contracted for, and paid the fee for, a course of study offered by the school, the student who had distributed that card would be, at his option, paid a stated sum or would have an equal sum credited against the cost of his further studies.

[32 FR 15919, Nov. 21, 1967]

§ 15.150 Trade association publication of advertisements for use by members featuring range of prices to be charged consumers.

(a) The Commission advised a trade association in the home improvement field that it would probably not be illegal for the association to furnish its members with advertising featuring a range of prices to be charged consumers.

(b) The advertisements in question were to be included in a booklet to be sent to all members and would be suitable for mailing to the members' customers. The advertisements would depict typical home improvements projects, list the specifications for the project and state a range of prices in terms of dollar amounts per month for a specified number of years. The prices would be qualified by stating that they will vary according to labor and material costs in various areas. One page of the booklet would include a schedule of financing charges for 1, 2, 3 years, etc. The advertisements would be marked "Proof" and members purchasing the booklets to send to their customers would have the option of changing any of the suggested project prices if they desire.

(c) The opinion stated that, in general, there could be no objection to the proposal if implemented exactly as outlined above. In this connection, however, the Commission added that all involved should be aware of the dangers of suppressing or eliminating or restraining price competition among individual builders or contractors because of the fact that prices are to be included in the advertisements. Thus, this plan would be rendered unlawful if in practice the suggested prices were used as a subterfuge or pretext for horizontal price agreements, or otherwise restraining competition, between contractors or builders in particular market areas. Special care must therefore be taken to insure that the legality of the plan is not impaired by the manner in which it is implemented. This advisory opinion is expressly predicated on the assumption that the proposal will be implemented in strict conformity with the representations made to the Commission.

[32 FR 15919, Nov. 21, 1967]

§ 15.151 Commission cannot approve substantial additional annual volume discount pricing program.

(a) The Commission advised a manufacturer it cannot approve a pricing proposal to provide customers an additional 10 percent discount on all purchases above $15,000 in volume within the calendar year. The additional discount would be granted as soon as the

$15,000 volume is reached in the year. The proposal was scheduled to go into operation in 1968. The same rules would apply for each succeeding calendar year. Also, the program would provide a further discount on purchases above $25,000 in annual volume. The present pricing program is not under examination.

(b) The manufacturer sells his products solely to nonexclusive distributors who resell them, and similar commodities produced by other suppliers, to end-users.

(c) The Commission told the manufacturer it cannot approve the proposal because there is a strong likelihood that price discriminations in violation of section 2(a) of the Clayton Act may result if the proposal is put into operation. The Commission pointed out that price discriminations to customers who in fact compete with each other in resale of commodities of like grade and quality would violate section 2(a) of the Clayton Act unless cost justified or unless the lower price is a good faith meeting of a competitor's equally low price.

[32 FR 17582, Dec. 8, 1967]

§ 15.152 Product certification program.

(a) The Commission rendered an advisory opinion involving a trade association's proposed use of a certification mark which is designed to upgrade the safety and quality of a particular product.

(b) Specifically, the Commission was requested to rule upon the following two questions:

(1) Can the association require nonmembers to join the association as a condition precedent to using the association's patented certification mark?

(2) If not, can the association charge nonmembers a higher fee than members for use of the mark?

(c) In response to the first question, the Commission said that it should not grant approval to a program where the "trade association requires nonmembers to join the association as a condition to using the association's patented certification mark because there is at this time insufficient information to evaluate the impact on competition of such a restriction." Commenting further upon the first question, the Commission sent the requesting party a copy of Advisory Opinion Digest No. 96, dealing with a closely related situation where the Commission did give its approval to a similar program on condition that all competitors be given unrestricted and nondiscriminatory access to its certification program whether they were members of the association or not.

(d) In response to the second question, the Commission reached the following conclusion: "* * * nonmembers of the association may be charged a higher fee than members provided it represents no more than a reasonable differential to insure that members and nonmembers of the association alike pay an equal share of the costs necessary to support the program. In short, if members of the association by payment of dues or other assessments have borne some of the cost of the program not reflected in the certification fees charged them then the payment of that portion of the costs may be reflected in the fees charged to nonmembers. This advisory opinion of course cannot give you more than general guidance on this matter and the question of what is a reasonable differential would have to be decided on the facts of each case."

[32 FR 17856, Dec. 13, 1967]

§ 15.153 Proposal to grant discounts for increased annual purchases.

(a) The Commission rendered an advisory opinion in which an applicant was informed a proposal to grant discounts to a certain class of customers—jobbers who bought his products for resale—to be given at the end of a sales year based on increased amounts of purchases over purchases in the preceding sales year cannot be approved because it appears on its face the proposal would violate section 2(a) of the Clayton Act if it were put into operation. The proposal was based on the following scale:

(1) 2 percent discount on a 20 percent to 29 percent inclusive increase;

(2) 3 percent discount on a 30 percent to 39 percent inclusive increase;

(3) 4 percent discount on a 40 percent to 49 percent inclusive increase; and

(4) 5 percent discount on a 50 percent or more increase.

(b) The Commission further pointed out that price discriminations to customers who in fact compete with each other in resale of commodities of like grade and quality would violate section 2(a) of the Clayton Act unless cost justified or unless the lower price is a good faith meeting of a competitor's equally low price.

[32 FR 18087, Dec. 19, 1967]

§ 15.154 Legality under antitrust laws of complying with State milk marketing orders.

(a) The Commission rendered an advisory opinion that a distributor who complied with a State's milk marketing order fixing the minimum resale prices of dairy products would not be subject to a charge of violating the antitrust laws.

(b) The distributor in question did not have a warehouse in the State in question, but shipped dairy products into the State from its warehouses located in neighboring States. In most cases, the price increases required by the order issued pursuant to the State's dairy products marketing act would be significant and the distributor sells the same products at substantially lower prices to stores located in the neighboring States because competitive pressures dictate lower prices except where the higher prices are required by law.

(c) The distributor expressed concern that by agreeing to comply with the orders of the State, it would subject itself to possible action under the Sherman Act, the Federal Trade Commission Act, or possibly even the Clayton Act, as amended by the Robinson-Patman Act, since sales will be made at different prices to purchasers in different States of commodities of like grade and quality. Hence an opinion was requested as to whether the distributor will be in violation of any of the laws administered by the Commission if it complies with the State laws fixing the minimum resale prices of dairy products.

(d) The Commission advised that it was of the opinion that the distributor would not be subject to a charge of violating any of the laws it administers because of its compliance with the lawful orders of the State as to the minimum resale prices of dairy products. In the Commission's view, it is well settled that the antitrust laws have application to the actions of individuals, partnerships, and corporations and not to the activities of a State. While a State may not authorize individuals to perform acts which violate the antitrust laws nor declare that such action is lawful, it may, in the exercise of its sovereign power, itself conduct such regulation of business activities within its borders as its own legislature shall properly deem necessary in the public interest. So long as the resulting regulation is a State as opposed to individual activity, those subject to the regulation would not be subject to a charge of violating the antitrust laws by reason of their compliance with the State's orders.

[32 FR 20716, Dec. 22, 1967]

§ 15.155 Varying discount price schedule—distributor recruitment through grant of override.

(a) The Federal Trade Commission advised a manufacturer of household products that his proposed varying discount price schedule and his proposed granting of bonus payments to recruiting distributors on the business of distributors whom they recruit would, under the facts presented, in all probability result in violation of both section 2(a) of the amended Clayton Act and section 5 of the Federal Trade Commission Act.

(b) The manufacturer proposed to appoint as independent distributors such persons as would buy the requisite amount of inventory. Initial sales to such distributors would be at 33⅓ percent off the manufacturer's suggested prices for his products. Incentive bonuses, computed at from 5 percent to 60 percent of the value of their purchases, increasing as the value of purchases increased, would be paid from time to time to the distributors. Distributors would be encouraged to recruit additional distributors who would also make a capital investment in inventory. A recruiting distributor would be given a 10- to 12-percent override on the dollar volume of purchases of any distributor whom he had recruited.

(c) The Commission noted that because of the nature of the plan it was almost inevitable that very wide differences in prices would be charged customers, some of whom would, by reasonable assumption, be competitive with others. These differences would be so great that the anticompetitive effects made unlawful by the amended Clayton Act would almost certainly follow.

(d) In addition, it is clear from the facts presented that the requesting party contemplates that the so-called independent distributors would be for the most part selling at retail. The marketing plan is not primarily designed as an offer to knowledgeable businessmen, competent to weigh and evaluate commercial risks. It is designed, rather, to appeal to uninformed members of the general public, unaware of and unadvised of, the true nature of the risks run—persons with limited capital who are led to part with that capital by promises and hopes which are seldom, if ever, fulfilled. A particular vice of the plan is that part which provides override bonuses for recruited distributors. Implicit in such an arrangement is the promise, rarely if ever kept, that the recruiting distributor can, without himself working, profit greatly from the work of others.

[32 FR 20960, Dec. 29, 1967]

§ 15.156 Origin of toilet preparations.

(a) The Commission rendered an advisory opinion in regard to the legality of using foreign words indicating French origin in the brand name of a toilet preparation, where the product is blended in the United States with domestic alcohol and French oils. Specifically involved in the opinion was the propriety of using foreign words in the brand name of the product immediately followed by the following qualification—"Blended with French Oils in USA".

(b) In its opinion, the Commission said that the question posed is governed by Rule 3(b) of trade practice rules for the cosmetic and toilet preparations industry. "This rule," the Commission said, "specifically forbids the use of any foreign word or depiction in the brand name of a toilet preparation which may tend to convey the erroneous impression that the product is made wholly in a foreign country, unless a conspicuous disclosure is made in close conjunction therewith of the fact that such product was blended in the United States."

(c) Concluding its opinion, the Commission said: "* * * the proposed disclosure, 'Blended with French oils in USA,' would meet the requirements of Rule 3(b) as an adequate qualification of a French brandname to describe a product blended in the United States with domestic alcohol and French oils. It is not necessary to disclose the presence of French oils, but this disclosure is permissible so long as the statement is factually true."

[32 FR 20960, Dec. 29, 1967]

§ 15.157 Paying advertising allowances in selected trade area.

(a) The Commission rendered an advisory opinion in which it advised a manufacturer of a household product that it would be permissible to pay advertising allowances to all customers in a limited trading area without offering the allowance to all of its customers.

(b) In its opinion, the Commission said that it was a well settled principle of law that if a supplier offers advertising allowances to one customer, he is required by section 2(d) of the Robinson-Patman Act to make those allowances available to those customers who compete in the distribution of the product for which an allowance is being paid. Under these circumstances, it follows that the supplier can limit the area in which the promotional allowance will be paid, as long as the allowance is made available on proportionally equal terms to all customers who compete in the distribution of the product being promoted.

(c) "This means," the Commission concluded, "that if there are customers located on the periphery of the selected trade area who in fact compete with the favored customers, they must also have the opportunity of participating in the promotional program on proportionally equal terms."

(d) Concluding its opinion, the Commission said: "Assuming that you selected a reasonable trading area, even though limited, and assuming that you confine the duration of the program within the strict time limits absolutely necessary for you to determine the efficacy or feasibility of the program, we do not believe that your action will run afoul of any law administered by this Commission."

[33 FR 72, Jan. 4, 1968]

§ 15.158 Proposed trade association adoption of a pricing manual for common use by electronics servicemen members.

(a) The Commission rendered an advisory opinion with respect to the legality of a trade association preparing and distributing a standard rate and service pricing manual for common use by electronics servicemen in dealing with the general public.

(b) It was represented that a major problem in the industry is the lack of guides by which the public can determine whether prices charged for various repair services are fair and equitable. This lack has led to many customer complaints and to fraudulent operations by unethical repairmen. The association took the position that a standard rate schedule would protect the public and free ethical servicemen from unjust accusations.

(c) The Commission advised that it could not give its approval to the proposed common use of a standard rate and service pricing manual by competing electronics servicemen. While the adoption and dissemination by the association of such a manual may be motivated by a purpose to remove evils affecting the industry, it appears to go further than is reasonably necessary to accomplish the desired result. Even though use of such manual be accompanied by disclaimers, there is implicit therein too grave a danger that it will serve as a device through which service rates and fees would become uniform and stable throughout the industry. While adoption of a means likely to create competitive uniformity in terms of service pricing may be a convenience to trade association members, this factor is far outweighed by the benefits to the public of the intense competition between competing servicemen, and it is this competition which the law protects.

[33 FR 72, Jan. 4, 1968]

§ 15.159 Advertising offering sale of treatment for athlete's foot.

(a) The Commission rendered an advisory opinion in which it declined to give approval to advertising which offered to sell information as to a method of treatment which was represented to effect a cure for athlete's foot.

(b) For a stated sum of money, the advertisement in question offered to send prospective purchasers complete information detailing a simple, inexpensive cure for athlete's foot "with two products probably at present in your medicine cabinet." The treatment in question involved washing the feet with water and alcohol and then applying a common household salve. The Commission advised that it could not give its approval to any advertising which represents that this method of treatment will effect a cure for athlete's foot or to any advertising which goes beyond claims that the treatment will afford temporary relief from the itching and burning associated with athlete's foot.

(c) The opinion went on to state that the laws against deceptive advertising apply equally to those who are selling advice or information and to those who are selling products. In either case, in the Commission's view the test is whether the advice (or product) being offered will in fact achieve the results claimed for it in the advertising. If the advice recommends the use of a product, the efficacy of the product for the use recommended must of course also be considered.

(d) Finally, the Commission advised that the opinion in no way related to the question of whether the proposal would constitute the practice of medicine nor to the legality of the requesting party doing so.

[33 FR 459, Jan. 12, 1968]

AVAILABLE

§ 15.160 Advertising promoting sale of information and a product.

(a) The Commission issued an advisory opinion in regard to the legality of proposed advertising promoting the sale of information, which in turn advocated the purchase of an alleged stomach remedy. The individual requesting the opinion had no financial interest in or contractual right to advertise the product in question.

(b) The initial advertisement offered the sale of information for 20 cents and claimed that the information would enable one "to get that nervous stomach functioning properly again." Based upon the scientific information available to it, the Commission ruled that the product being advocated in the information being sold was not in fact a cure or treatment for nervous stomach or any other stomach ailment. Under the circumstances, the Commission concluded that the claim in the initial advertisement was deceptive.

(c) Its opinion concluded with the following statement: "The laws against deceptive advertising apply equally to those who are selling advice or information and to those who are selling products. In either case the test is whether the advice (or product) being offered will in fact achieve the results claimed for it in the advertising. If the advice recommends the use of a product, the efficacy of the product for the use recommended must of course also be considered.

(d) "This opinion in no way relates to the question of whether your proposal would constitute the practice of medicine or to the legality of your doing so."

[33 FR 459, Jan. 12, 1968]

§ 15.161 Advertising promoting sale of information and a product.

(a) The Commission issued its advisory opinion concerning proposed advertising offering for sale for $1 a pamphlet which: (1) Advises a method for curing athlete's foot and (2) recommends the use of a specific proprietary product for this purpose. The advertiser has no financial interest in the product in question. He does not himself propose to sell the product.

(b) The Commission stated that use of the proposed advertising would be violative of sections 5 and 12 of the Federal Trade Commission Act in that it implies, contrary to fact, that all cases of athlete's foot can be eliminated or cured by use of the advertised method and product "within a very short time" and with "patience and a little care". The Commission believes that the proposed advertising implies, contrary to fact, that through it some new facts as to the care and cure of athlete's foot are now available which have hitherto been withheld from the public.

(c) Its opinion concluded with the following statement: "The laws against deceptive advertising apply equally to those who are selling advice or information and to those who are selling products. In either case the test is whether the advice (or product) being offered will in fact achieve the results claimed for it in the advertising. If the advice recommends the use of a product, the efficacy of the product for the use recommended must of course also be considered. This opinion in no way relates to the question of whether your proposal would constitute the practice of medicine or to the legality of your doing so."

[33 FR 627, Jan. 18, 1968]

§ 15.162 Exchanging wage rates among association members.

(a) The Commission rendered an advisory opinion in regard to the legality of a trade association's proposed statistical reporting plan.

(b) Specifically, the Commission was asked to rule upon the question of whether it would be permissible for the members of an association to exchange copies of their labor contracts.

(c) The Commission ruled that it had no objection to the proposed plan itself, provided it was not used for some illegal purpose. If the plan is used as a means for fixing or tampering with the price of milk, or for some other illegal purpose, the Commission stated it would of course have serious objection to the plan. Pointing to the antitrust hazards inherent in such a plan, the Commission said:

(d) "Statistical reporting plans which involve the collection and dissemination of data related to future prices are not illegal per se. However, experience in other cases indicates that an association's price reporting plan which involves future or advance prices, particularly when that plan invites an industrywide pricing policy, may provide the basis for an inference of an agreement or combination to fix prices in violation of section 5 of the FTC Act. Since labor costs represent a very significant element bearing upon the future price of milk, an agreement among competitors as to wage rates would be illegal since it would have the effect of fixing the price of milk. In essence, it is the potential danger inherent in the reporting plan which is related to future prices that prompts the Commission to suggest that it be used with extreme care."

[33 FR 1073, Jan. 27, 1968]

§ 15.163 Publication of dealer sales standards announcing a policy of not selling to dealers who advertise sale prices.

(a) The Federal Trade Commission rendered an advisory opinion stating its objection to a proposal by a seller of photographic products to announce to the trade its policy to sell only to dealers who advertise in a manner which will not damage the prestige of the seller, avoiding the use of characterizations such as "Sale," "Bargain," "Close-Out," "Clearance," or other similar terminology.

(b) The seller advised that it proposed to implement the standards by delivering a copy to each existing dealer, not for the purpose of terminating any presently unsatisfactory dealers, but to upgrade them to a satisfactory level. This the seller proposed to do by having its representatives work with the dealers to see that they observe the standards and contended that this is permissible since this is simply an advertising restriction, not an effort at resale price maintenance. It was further argued that although the price at which its products are sold is the prerogative of the dealer, the seller has a legitimate business interest in the manner in which its products are advertised by those dealers. The Commission also noted that the standards concluded with the statement that evaluation of the progress of dealers will be made from time to time and those who are not keeping pace will be discontinued.

(c) The Commission advised that it could not give its approval to this proposal for the reason that its implementation as outlined would be likely to result in an illegal restraint of trade. In the first place, the Commission advised that it could not view the proposal as a simple restriction on advertising apart from the effect which that restriction would have on the price at which those dealers sell. While there is a difference between this and a policy of selling only to dealers who maintain the prices suggested by the seller, in that the dealers are ostensibly left free to sell at any price they choose, still a restriction on their ability to advertise sale prices is certainly a grave handicap on their ability to sell at prices below those suggested. Hence the provision, if not one designed to maintain suggested prices, is one which will seriously affect those prices.

(d) The Commission further advised that its view of the present state of the law in this area was that a seller not acting to create or maintain a monopoly may make a unilateral announcement of his policy as to those with whom he will deal, including policies affecting price, and he may refuse to deal with those who do not observe that policy. However, when the seller's actions, as they would under this proposal, go beyond a mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his policy, he is in serious danger of having put together a combination in violation of the antitrust laws. Thus, the Commission stated, the line between legal and illegal conduct here is a very narrow one and if the seller chooses to walk that line, he must do so at his peril.

[33 FR 2382, Jan. 31, 1968]

§ 15.164 Premerger clearance: No anticompetitive effects foreseeable.

(a) The Commission issued an advisory opinion on May 14, 1964, in which a request for premerger clearance from liability under section 7, amended Clayton Act, was approved permitting acquisition of a distributor by the manufacturer of products distributed.

(b) A franchised distributor of electrical equipment sought clearance of its acquisition by the manufacturer of products he distributed. The relationship between the firms had existed for many years, was cancellable on 90 days notice, the trend in the line of business involved was to direct sales from manufacturer to purchaser and no substantial adverse competitive effects were foreseeable.

(c) The Commission advised the requesting party that the acquisition would not violate Commission administered law; however, he was advised that the opinion was predicated on the understanding: (1) That competing distributors would not be foreclosed from supplies he distributed and (2) that preexisting relationship between him and said supplier would not be altered without prior Commission approval.

[33 FR 2887, Feb. 13, 1968]

§ 15.165 Premerger clearance: Deteriorating financial condition.

(a) The Commission issued an advisory opinion on July 30, 1964, in which a request for premerger clearance from liability under section 7, amended Clayton Act, was approved permitting acquisition of a deteriorating competitor.

(b) A national manufacturer and distributor of consumer goods sought clearance of its proposed acquisition of a smaller manufacturer and distributor of the same products. Most of the business of the smaller firm was in a limited geographical area. The industry involved could be entered with a relatively modest sum of money. The firm to be acquired had experienced declining sales, a deteriorating, nonviable financial situation, personnel problems and had made reasonable but unsuccessful efforts to sell to others.

(c) The Commission advised that basing its belief on the information currently available to it that the proposed transaction, if consummated, probably would not violate any of the laws which the Commission administers.

[33 FR 2887, Feb. 13, 1968]

§ 15.166 Premerger clearance: Declining industry.

(a) The Commission issued an advisory opinion July 30, 1964, in which a request for premerger clearance from liability under section 7, amended Clayton Act, was approved permitting acquisition of a failing company in a declining industry.

(b) A single-line manufacturer of a byproduct of the cotton industry desiring to be acquired by a multiproduct company in the chemical industry sought clearance of its proposed acquisition. The firms were competitors but demand for the product was declining due largely to wide fluctuations in price. There was also increasing production of competitive products made from wood pulp which could be used for the same purposes, and reasonable, but unsuccessful attempts had been made to sell to others.

(c) The Commission, basing its belief on the information then before it, advised that the proposed sale probably would not violate any of the laws it administers.

(d) The Commission added that the opinion should not be construed as in any way affecting any other matter involving the requesting party or the purchaser which the Commission was then or might thereafter investigate.

[33 FR 2887, Feb. 13, 1968]

§ 15.167 Premerger clearance: Deteriorating industry.

(a) The Commission issued an advisory opinion on August 18, 1964, in which a request for premerger clearance from liability under section 7, amended Clayton Act, was approved permitting acquisition of a failing competitor.

(b) One of the larger manufacturers of industrial clay products sought clearance to acquire a smaller manufacturer of the same product. The smaller manufacturer did not have as extensive a product line as the larger company. The companies partially competed in a limited geographical area; however the smaller firm had been unable to replace key personnel and the trend in its financial condition was downward. Further, its employees, comprising about 20 percent of the work force in a small community, faced loss of jobs if the smaller company went out of business. Lastly, the other party was the only available purchaser.

(c) Basing its belief on the information then before it, the Commission advised the proposed sale probably would not violate any of the laws which it administers.

[33 FR 2887, Feb. 13, 1968]

§ 15.168 Premerger clearance: Imminent insolvency.

(a) The Commission issued an advisory opinion on October 27, 1964, in which a request for premerger clearance from liability under section 7, amended Clayton Act, was approved permitting acquisition of a failing competitor in financial distress.

(b) A firm in a local service business requested clearance to merge with a competitor, with whom it was aligned in its activities, and to form a new corporation. The service firm had experienced declining earnings for the past 8 years and there was strong competition from other service businesses in the area in which both did business. The requesting party had experienced an increase in operating costs and expenses in relation to sales, was in a critical financial condition and apparently could not long continue to operate as a solvent and going concern. A national chain was the only other possible purchaser.

(c) The Commission basing its belief on the information then available to it advised that the transaction would not violate any of the laws which it administers.

[33 FR 2888, Feb. 13, 1968]

§ 15.169 Premerger clearance: Financial distress.

(a) The Commission issued an advisory opinion on May 26, 1965, in which a request for premerger clearance from liability under section 7, amended Clayton Act, was approved permitting acquisition of an integrated competitor in poor financial condition.

(b) A large diversified manufacturer of closures with less than 3 percent of its total sales accounted for by a speciality closure product, sought to acquire the second largest integrated manufacturer of such products, in an industry dominated by another fully integrated company. The first four firms in the industry accounted for about 55 percent of the market. The company to be acquired was in poor financial condition, and it was doubtful whether its credit standing could support the new financing necessary for plant improvement and extension of product lines which were needed to improve its competitive position.

(c) The Commission basing its opinion on the information available to it advised: (1) That it would not challenge the acquisition if consummated, but (2) that such advice was given without prejudice to the right to reconsider in the event anticompetitive effects causally connected to the acquisition were manifested in the future.

[33 FR 2888, Feb. 13, 1968]

§ 15.170 Premerger clearance: De minimis competitive effect.

(a) The Commission issued an advisory opinion on June 8, 1965, in which a request for premerger clearance from liability under section 7, amended Clayton Act, was approved permitting acquisition of a competitor's unprofitable operating division.

(b) A large manufacturer of a diverse line of aeronautical supplies sought Commission approval for the disposition of one of its operating divisions which was an unprofitable part of its total business. The proposed purchaser was another diversified corporation also engaged to a small degree in the same line of commerce. It was evident that although these two companies ranked high in market shares, there were many others in the business, and that restrictive licenses were often used by customers to exercise an effective consumer-control of the survey market. The total dollar value of the business being sold was small and it appeared there would be a liquidation of the assets if the sale was not made.

(c) The applicant was advised that based on the available information a proceeding would not be initiated by the Commission to challenge the acquisition. The Commission added that the advice was being given without prejudice to its right to reconsider the questions involved in the event substantial anticompetitive effects attributable to the acquisition were manifested in the future.

[33 FR 2888, Feb. 13, 1968]

§ 15.171 Premerger clearance denied: Adverse competitive effects probable.

(a) The Commission issued an advisory opinion on June 10, 1965, in which a request for premerger clearance from liability under section 7, amended Clayton Act, was denied because of the existence of probable adverse competitive effects.

(b) A manufacturer/retailer of consumer leather goods requested clearance for its proposed acquisition of a major regional retailer of products produced by the manufacturer. The horizontal and vertical implications of this proposed merger were similar to those which were declared unlawful in the case of *United States* v. *Brown Shoe*, 370 U.S. 294 (1962). However, the market shares were smaller and probable adverse competitive effects somewhat less than were present in the Brown Shoe case.

(c) The Commission advised there existed a substantial probability that the proposed acquisition would be a violation of the Clayton and Federal Trade Commission Acts. The application for premerger clearance was denied.

(d) Thereafter, the acquisition was consummated. A complaint issued and a consent settlement effected whereby the acquiring company agreed to make no further acquisitions of retailers or manufacturers of the product involved for a period of several years without prior Commission approval.

[33 FR 2888, Feb. 13, 1968]

§ 15.172 Premerger clearance: Adverse competitive effects not discernible.

(a) The Commission issued an advisory opinion on July 23, 1965, in which a request for premerger clearance from liability under section 7, amended Clayton Act, was given limited approval because it did not appear that the acquisition would result in the requisite adverse competitive effects.

(b) A diversified processor, wholesaler, and retailer sought clearance for its proposed acquisition of an independent food supplier which sold a major portion of its products to a subsidiary of the acquiring company. The isolated transaction did not appear to have the requisite substantial adverse competitive effects called for by the statute, but in view of pending investigations of additional acquisitions by the acquiring company, an unrestricted clearance could not be approved by the Commission.

(c) The Commission advised that it would take no action solely as to the proposed transaction if it was consummated. The Commission added that it conditioned its advice on assurances that by accepting and acting upon the opinion, the acquiring company would not use the opinion as precedent or argument in the investigation, or in the formal or informal hearings, of any matter involving the acquiring company then pending or which might come before the Commission or any other court or agency.

(d) The Commission added that if at some future date the acquiring company was required to divest the subsidiary which was actually taking over the independent company, the parent company would not object to divestiture of the independent food supplier on terms set by the Commission or other court or agency.

[33 FR 2888, Feb. 13, 1968]

§ 15.173 Premerger clearance denied: Lack of competitive information.

(a) The Commission issued an advisory opinion on October 29, 1965, in which a request for premerger clearance from liability under section 7, amended Clayton Act, was denied for lack of competitive information concerning competition in the line of commerce involved.

(b) A leading manufacturer of dispensing machines sought approval of its proposed purchase of a smaller, family held manufacturer of dispensing machines which were complementary to the product line of the acquiring company.

(c) The Commission declined to render an opinion because of: (1) The paucity of competitive information concerning competition in the line of commerce with which the acquired company's machine was identified, and (2) the short time period available between the date of the request and the closing date agreed upon between the parties. This short time precluded a more complete investigation and analysis.

[33 FR 2889, Feb. 13, 1968]

§ 15.174 Premerger clearance denied: Vertical merger would raise questions.

(a) The Commission issued an advisory opinion September 8, 1966, in which a request for premerger clearance from liability under section 7, amended Clayton Act, was denied because the competitive implications of the acquisition would raise economic questions resolvable only by investigation.

(b) A leading construction material producer applied for clearance of its proposed acquisition of a diversified company having a large share of a regional market in the sale of raw materials such as sand, gravel, and stone, which were complementary to its principal product line. The requesting party offered to dispose of certain producing plants now operated by the company, and to continue appropriate leases of other such plants as the company owned.

(c) The Commission advised the requesting party that the competitive implications of the integration of construction material distributors with sources of raw materials were such that an investigation to assess the economic effects of the acquisition, if it was consummated, would be necessary.

[33 FR 2889, Feb. 13, 1968]

§ 15.175 Interpretation of request for premerger clearance: Declining industry.

(a) The Commission issued an opinion October 8, 1965, in connection with a request for advice by two respondents as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting them from, among other matters, uniting facilities so as to eliminate competition.

(b) One respondent, a small company in the coin operated machine business, desiring to be acquired by the other, a larger company in the same industry, applied for clearance of the proposed acquisition under Commission established procedures. It was reported that the smaller respondent was in financial difficulties to the point where it was approaching failure. Further reasons advanced to support the proposed merger were that demand for the product was on the decline, the industry easy to enter, and reasonable efforts to locate another purchaser had been unsuccessful.

(c) On the basis of available information, the Commission advised that if the smaller respondent sold its business to any company, the Commission did not intend to initiate proceedings with regard to such sale.

[33 FR 2889, Feb. 13, 1968]

§ 15.176 Premerger clearance: De minimis competitive effects.

(a) The Commission issued an advisory opinion on November 29, 1966, in which a request for premerger clearance from liability under section 7, amended Clayton Act, was approved permitting acquisition of a company in financial distress.

(b) A dairy products processing company in financial difficulty desiring to be acquired by a larger company in the same field applied for clearance of the proposed acquisition. The companies competed to a limited extent; however, the applicant had losses for a number of years, could not obtain long-term financing and had made numerous unsuccessful attempts to see to others.

(c) The requesting party was advised that, relying on his representations as to the hopeless financial condition and unsuccessful efforts to sell, the Commission would not challenge the proposed acquisition if it were consummated.

[33 FR 2889, Feb. 13, 1968]

§ 15.177 Compliance interpretation of request for premerger clearance: Imminent insolvency.

(a) The Commission issued an opinion February 14, 1964, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting the acquiring company from making certain acquisitions.

(b) A small company manufacturing food products applied for clearance of its acquisition by a larger producer engaged in operations in the same product line. The larger producer was subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval.

(c) Both producers competed in the same general trading area. It was presented that the smaller company was in imminent danger of insolvency and that it had exhausted every possibility of locating another purchaser without success.

(d) On the basis of available information, but primarily because of the equities affecting the smaller company's position in the industry, the Commission gave its approval to the proposed acquisition.

[33 FR 2890, Feb. 13, 1968]

§ 15.178 Compliance interpretation of request for premerger clearance: Denied, other purchasers available.

(a) The Commission issued an opinion April 2, 1964, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting the acquiring company from making certain acquisitions.

(b) A large company in the food products field applied for clearance of its proposed acquisition of a smaller company engaged in operations in the same product line. The larger company was subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval.

(c) Both companies were in substantial competition in the same general trading area. It was determined that other prospective purchasers were available and that the smaller company was of considerable size when compared with other regional producers.

(d) The Commission advised that the proposed merger could not be approved under the circumstances.

[33 FR 2890, Feb. 13, 1968]

§ 15.179 Compliance interpretation of request for premerger clearance: Imminent bankruptcy.

(a) The Commission issued an opinion October 28, 1964, in connection with a request for advice from a small company as to whether its proposal to merge with any other company in the same field would, if consummated, be in violation of section 7, amended Clayton Act.

(b) A small food products manufacturer applied for advice from the Commission regarding the possibility of selling out to any other company operating in the same field, particularly to a large processor in the same products line. The larger producer was subject to a Commission order prohibiting such acquisitions for a designated period of time without prior Commission approval.

(c) It was presented that the requesting company had made reasonable but unsuccessful attempts to locate a purchaser other than the larger company, and moreover was on the verge of bankruptcy.

(d) On the basis of available information, but primarily because of the equities affecting the requesting company's position in the industry, the Commission advised that an acquisition by another producer in the same field would not be in violation of section 7, amended Clayton Act, and in the event a sale is made to a company which is under Commission order requiring approval of such acquisition, an approval would be granted.

(e) In clearing the proposed sale the Commission pointed out that the approval might be reconsidered, revoked or rescinded if it subsequently appeared the facts submitted were inaccurate, incomplete or that they had changed at the time a sale was made.

[33 FR 2890, Feb. 13, 1968]

§ 15.180 Compliance interpretation of request for premerger clearance: Imminent insolvency.

(a) The Commission issued an opinion September 24, 1965, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding Commission order prohibiting the acquiring company from making certain acquisitions for a designated period of time without prior Commission approval.

(b) A small food products manufacturer applied for clearance of its proposed acquisition by a larger company under Commission order and which was much more extensively engaged in the same product line. The requesting company was experiencing a decline in annual profits to the point of insolvency. It was reported that refinancing was not available and the smaller company was not, for a number of reasons, a viable concern in the context of the particular market. Exhaustive efforts to locate another purchaser had been unsuccessful.

(c) On the basis of available information the Commission gave its approval to the proposed acquisition.

[33 FR 2890, Feb. 13, 1968]

§ 15.181 Compliance interpretation of requests for premerger clearance: De minimis competitive effects; one request denied.

(a) The Commission issued opinions on February 9, 1966 and January 26, 1967, in connection with requests for advice, as to whether several proposed mergers, if consummated, would be in violation of an outstanding Commission order prohibiting future acquisitions by respondent for a designated period of time without prior Commission approval.

(b) A large automatic machine company under Commission order sought approval for the proposed acquisition of two smaller, local companies engaged in the same line of business. In one metropolitan area respondent and the first smaller company were in competition, and in the other trading area respondent and the second smaller company did not compete to any significant degree. In the first area there were a substantial number of local and national competitors involved, and in the other area a substantial number of local competitors and one national competitior were involved.

(c) In these two instances the Commission approved the proposed acquisitions.

(d) In a third request for advice involving a different trading area, the respondent sought clearance for the proposed acquisition of a smaller, local company engaged in the same line of business in direct competition with the larger company. There was a concentration in the line of commerce involved. The Commission denied the request for clearance because it was incompatible with the objectives of the order prohibiting such acquisitions.

[33 FR 2890, Feb. 13, 1968]

§ 15.182 Compliance interpretation of request for premerger clearance: Liquidation probable.

(a) The Commission issued an opinion May 24, 1966, in connection with a request for advice as to whether a proposed acquisition, if consummated, would be in violation of an outstanding order prohibiting respondent from making certain acquisitions for a designated period of time without prior Commission approval.

(b) A large manufacturer of food products sought clearance of its proposal to acquire a smaller manufacturer engaged in the same general line of commerce. The requesting manufacturer was, and is now, subject to a Commission order prohibiting, among other things, the making of certain acquisitions for a designated period of time without prior Commission approval. The two manufacturers were not in competition in the same geographical trading area, but to a very limited extent the requesting manufacturer was a supplier to the smaller company.

(c) The smaller manufacturer had made reasonable but unsuccessful at-

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tempts to sell to others in the industry and in the circumstances liquidation apparently was the only alternative to the proposed sale.

(d) The Commission advised that, in reliance on the information submitted by the parties, if the proposed acquisition was made, the Commission would not proceed against the acquiring company.

[33 FR 2891, Feb. 13, 1968]

§ 15.183 Compliance interpretation of request for premerger clearance: Denied, competitive considerations.

(a) The Commission issued an opinion July 20, 1966, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting the acquiring company from making certain acquisitions.

(b) A large manufacturer of industrial products sought clearance for its proposed acquisition of a smaller company in the same as well as in a complementary product line. The requesting manufacturer was, and is now, subject to a Commission order prohibiting, among other things, the making of certain acquisitions for a designated period of time without prior Commission approval.

(c) Both manufacturers were competitors and the smaller was quite capable of growing and developing in the industry. Further, no efforts had been made to locate other possible purchasers.

(d) The Commission advised that approval for the proposed acquisition would not be in the public interest because it would entail the acquisition of a competitor and further increase concentration in the industry.

[33 FR 2891, Feb. 13, 1968]

§ 15.184 Compliance interpretation of request for premerger clearance: Bankruptcy imminent.

(a) The Commission issued an opinion September 1, 1966, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting the acquiring company from making certain acquisitions.

(b) A small processor of food products applied for clearance of its proposed acquisition by a larger processor engaged in operations in the same general product line. The larger processor was, and is now, subject to a Commission order prohibiting, among other matters, the making of certain acquisitions for a designated period of time without prior Commission approval.

(c) The requesting processor was on the verge of bankruptcy and had made reasonable but unsuccessful attempts to locate another purchaser within the industry.

(d) The Commission advised that, in reliance on the information and data supplied, it would approve the request for clearance of the proposed acquisition.

[33 FR 2891, Feb. 13, 1968]

§ 15.185 Compliance interpretation of request for premerger clearance: De minimis competitive effect.

(a) The Commission issued opinions September 29, 1966, and January 26, 1967, in connection with requests for advice from a small company as to whether a proposal to merge, if consummated, would violate an outstanding order prohibiting either purchasing company from making certain acquisitions.

(b) A small processor of food products which was tightly held, having declining profits, increasing expenses, a loss of key personnel, a plant too small to compete efficiently, and an owner-manager who was determined to sell, applied for clearance for its proposed acquisition by either of two larger processors in the same general line of commerce. Both of the larger processors were subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval.

(c) On the basis of supplied information, the Commission cleared the request for acquisition by either of the two larger processors. Subsequently, however, partial acquisition by a third processor was approved, as was a partial acquisition by one of the larger concerns.

[33 FR 2891, Feb. 13, 1968]

§ 15.186 Compliance interpretation of request for premerger clearance: De minimis competitive effect.

(a) The Commission issued an opinion December 23, 1966, in connection with a request for advice as to whether a proposed merger, if consummated, would violate an outstanding order prohibiting the purchasing company from making certain acquisitions.

(b) The estate of a very small retailer of food products applied for clearance of its proposed acquisition by a larger processor engaged in operations in the same general product line. The larger company was, and is now, subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval. The retailer, a negligible factor in the industry and in the relevant geographical market, was not capable of development in the estate status.

(c) The Commission cleared the proposed acquisition.

[33 FR 2892, Feb. 13, 1968]

§ 15.187 Compliance interpretation of request for premerger clearance: Imminent insolvency.

(a) The Commission issued an opinion September 25, 1964, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding Commission order prohibiting the purchasing company from making certain acquisitions.

(b) A large integrated company manufacturing commercial products applied for clearance to acquire a smaller company engaged in operations in the same product line in the Western States. The larger company was, and is now, subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval.

(c) Both manufacturers were in direct competition in the geographical trading area. However, each held a relatively small share of the market involved. It was represented that the small concern had exhausted all other possibilities of selling to another purchaser, save to one or more of the other integrated manufacturers in the industry. The seller, who was suffering personal hardships because of illness in his family, had to leave the business and the area which it served.

(d) On the basis of the information and data supplied, the Commission cleared the request for clearance of the proposed acquisition.

[33 FR 2892, Feb. 13, 1968]

§ 15.188 Premerger clearance denied: Merger of firms in same industry would raise questions.

(a) The Commission issued advisory opinions on September 27, 1962, March 28, 1963, and September 12, 1963, in which commutual requests for premerger clearance from liability under section 7, amended Clayton Act, by a small dairy in financial difficulty were denied as to acquisition by a larger company in the same industry, but were finally approved permitting acquisition by a diversified corporation in another industry.

(b) A small dairy in financial difficulty desiring to be acquired by a larger company in the same field applied for clearance of the proposed acquisition. The larger company, an integrated processor and distributor of dairy products, was the respondent in a complaint in litigation with the Commission.

(c) The applicant was advised the proposed acquisition would raise questions similar to those involved in the proceedings and that the pendency of the proceedings made it inappropriate to express any further views. Reconsideration was requested. In response, the Commission informed the applicant of the decision in the Foremost Dairies case, Docket 6495 and again advised that the acquisition would raise serious questions under section 7 of the Clayton Act. Further, the Commission pointed out that it recognized the problems of small dairies and suggested further efforts to sell to a local or regional purchaser.

(d) Later, the small dairy requested consideration of its proposed acquisition by a large diversified corporation in the food industry. The Commission advised it would contemplate no action if the transaction was consummated. The Commission added its advice should not be construed as affecting any position it had previously taken against the acquiring corporation nor as in any way prejudicing any pending or future action it might take against the acquiring corporation regarding other acquisitions.

[33 FR 2892, Feb. 13, 1968]

§ 15.189 Premerger clearance: Precarious financial condition.

(a) The Commission issued an advisory opinion on March 20, 1963, in which a request for premerger clearance from liability under section 7, amended Clayton Act, was approved permitting acquisition of a company on the verge of insolvency.

(b) A manufacturer of consumer goods desiring to be acquired by a larger producer in the same field requested clearance of the proposed acquisition. His company had suffered declining sales for a number of years and was in a precarious financial condition to the point of being on the verge of insolvency. Further, reasonable attempts to sell to others had been made but there was no other purchaser which could preserve the competitive force possessed by the requesting manufacturer.

(c) The requesting party was advised that if the sale were consummated, the Commission would contemplate no action based on this transaction alone. The Commission added that its decision was based on representations that the smaller firm was in such dire financial straits that it faced impending bankruptcy. Further, the Commission stated it was expressing no opinion regarding prior acquisitions or on restrictive practices, if any, by the purchaser or any other company which may have contributed to the requesting party's failing condition.

[33 FR 2892, Feb. 13, 1968]

§ 15.190 Random distribution of "bonus certificates" with purchase.

(a) The Commission in an advisory opinion stated that the random inclusion of "bonus certificates" in egg cartons would be violative of section 5 of the Federal Trade Commission Act.

(b) The seller proposed to include "bonus certificates" in cartons of eggs offered for sale. The certificates were described as being worth "so many eggs or $5 in cash." They would be randomly distributed so that some cartons would contain eggs plus a bonus certificate of value, while others would contain eggs only, or eggs plus a certificate of little or no value.

(c) The Commission was of the view that this would be merchandising by lottery, a practice which the Commission has long held to be unfair within the meaning of section 5 of the Federal Trade Commission Act.

[33 FR 3054, Feb. 16, 1968]

§ 15.191 Advertisements which appear in news format.

(a) The Commission rendered an advisory opinion involving the question of whether it is deceptive to publish an advertisement in the format of a news article without disclosing it is an advertisement, as required in the Commission's press release of November 28, 1967.

(b) The factual situation presented to the Commission involved the publication of a column in a newspaper which advertised the cuisine facilities of several restaurants. Written in narrative form, the writeup about each restaurant usually identified the chief and/or head waiter, gave a brief description of how a certain meal is prepared, and contained other factual information concerning the hours during which meals are served, whether dancing is permitted, whether cocktails are served, and some general indication of the price range of the meal.

(c) In its opinion, the Commission concluded: "* * * the column uses the format and has the general appearance of a news feature and/or article for public information which purports to give an independent, impartial and unbiased view of the cuisine facilities of a particular restaurant. Since the column in fact consists of a series of commercial messages which are paid for by the advertisers, the Commission is of the opinion that it will be necessary to clearly and conspicuously disclose it is an advertisement, as outlined in the aforementioned press release. This conclusion would not be altered even though the column carried the exact cost of each meal being advertised, or if it listed the price range of the various meals."

[33 FR 3054, Feb. 16, 1968]

§ 15.192 Clearance denied for merger of competing milk companies.

(a) The Commission rendered an advisory opinion in which clearance was denied to an applicant to sell its milk processing and dairy products distribution assets to a large, integrated food producing, processing, wholesaling, and retailing concern. The proposed purchaser has a dairy products subsidiary in actual or potential competition with the applicant in the same market.

(b) The Commission noted that the proposed merger would combine the firm now appearing to rank fourth in sales in the market with the eighth to result in a firm in second or third position. It also appears that the present top four firms have about 40 percent of the sales in the market and therefore the proposed merger would further increase the market concentration.

(c) Because the proposed merger raises such serious questions of possible violation of section 7 of the amended Clayton Act, the Commission advised the applicant that premerger clearance cannot be granted. The Commission further stated that, if the merger occurs, the Commission may take the action it deems necessary to protect the public interest and prevent anticompetitive effects.

[33 FR 3170, Feb. 20, 1968]

§ 15.193 Substitution of merchandise unlawful even though equivalent in grade, quality, and appearance to that ordered by customers.

(a) The Commission was requested to render an advisory opinion with respect to the legality of substituting, on customer orders for a particular fabric, a fabric produced by another manufacturer without notifying customers of the intended substitution.

(b) It was represented that customers had long been supplied with a specific fabric and that sample display cards had been distributed to them advertising the availability of this fabric. The supplier recently discontinued production of the fabric and another supplier was located who will furnish a similar product said to be identical in pattern and of better quality. It was proposed to supply customers with the new product without resampling their display cards or otherwise advising them of the substitution, the cost of which, it was asserted, would be prohibitive.

(c) The Commission advised that it could not give its approval to this proposed business practice. A foreseeable result of substituting the product of one manufacturer for that of another would be to mislead customers into purchasing an article which they might not wish or intend to purchase, and which they might or might not purchase if they were informed as to its origin. Nor would the prejudice thus engendered be confined to customers; other distributors and manufacturers of a competing product would be injured when orders that would normally have come to them if the fabric were rightly named are diverted to the offending firm.

[33 FR 3170, Feb. 20, 1968]

§ 15.194 Use of uniform delivered pricing system effected by deducting freight allowances from f.o.b. price.

(a) The Commission advised a west coast manufacturer of industrial parts that it would not be illegal to use either a conventional uniform delivered pricing system based on averaged cost factors or a uniform delivered pricing system which will be effected by granting so-called freight allowances to be deducted from the manufacturer's f.o.b. factory price.

(b) The facts with respect to the second alternative were that the manufacturer proposed to establish an f.o.b. factory price of, for purposes of illustration, $99.50. Actual freight to west coast customers may be $0.50 and such customers would receive no allowance. Thus they would pay the manufacturer $99.50 and the carrier $0.50, making a total of $100. Then, again using hypothetical figures for purposes of illustration, actual freight to a Denver customer may be $1. The manufacturer would grant such a customer a $0.50 freight allowance to be deducted from the f.o.b. price, thus leaving the customer paying the manufacturer a price of $99 and the carrier $1, making a total of $100. Continuing east, actual freight to a Kansas City customer may be $1.50. The freight allowance would be $1, leaving the customer paying the manufacturer $98.50 and the carrier $1.50, for a total again of $100. This would continue in graduated steps across the country to where an east coast customer with actual freight costs of $3 would receive an allowance of $2.50, leaving him also paying a total of $100. The manufacturer advised that it was considering this alternative for administrative reasons, since it wished to pass title to the customers upon delivery to the carrier and have the customers handle all freight bills.

(c) With respect to the first question, the Commission advised that it was of the view that there could be no question of the manufacturer's right to unilaterally employ a uniform delivered pricing system, since if each buyer pays the same delivered price no question under the Clayton Act, as amended by the Robinson-Patman Act, would arise. While the factual situation under the second alternative is somewhat more complicated, the Commission was further of the view that it also would not result in a violation of law if implemented exactly as outlined above. In the Commission's view, the difference between the two systems is one of form rather than of substance and that it would make no legal difference whether the manufacturer computes its factory price and adds to it an amount equal to the average freight costs for delivering to all customers, as is done in the usual uniform delivered pricing system, or whether it accomplishes the same result by deducting an amount from the factory price which would have the effect of leaving each buyer paying an amount roughly equal to the same freight factor. In either event, it would seem that the manufacturer would have made freight a part of the price, so that each buyer's out-of-pocket costs would be exactly the same.

(d) The Commission further cautioned, however, that since this opinion deals in a projected manner with hypothetical figures chosen for illustrative purposes, the computations later to be made based upon actual cost factors must in practice achieve the result claimed in that each buyer will pay exactly the same net price including the freight. Any other result, the Commission stated, would be outside the scope of this opinion.

[33 FR 3336, Feb. 24, 1968]

§ 15.195 [Reserved]

§ 15.196 Commission holds not objectionable the advertising phrase "It works * * * or we'll fix it free."

The Commission rendered an advisory opinion whereby it concluded that a proposed phrase "It works * * * or we'll fix it free." is not objectionable and thus may be used in advertising, and on boxes containing products of a certain manufacturer. The Commission took account of information that the particular manufacturer does, in fact, repair without question and without charge of any kind (e.g., for parts, labor, "handling", or return postage) all of its products sent to it directly by owners or through retailers.

[33 FR 3374, Feb. 27, 1968]

§ 15.197 Use of term "Hand Made" to describe boot with a sealed sole.

(a) The Commission rendered an advisory opinion to the effect that the unqualified term "Hand Made" could not be used to describe a boot with a sealed sole.

(b) The requesting party is currently selling a completely hand made boot in which all parts are cut by hand and stitched together to form the uppers. It is hand lasted and then the sole is built up and stitched together by hand. The boot is labeled "Hand Made". The seller is now considering putting on a sealed sole to replace the leather sole. Other than that all operations will be identical, including the hand sewing of the heel counter. An opinion was requested as to whether a boot so constructed could still be labeled "Hand Made".

(c) The opinion advised that in the Commission's view the seller could not use the unqualified term "Hand

Made" to describe a boot with a sealed sole. He could, however, use the term to describe the part or parts which are sewn by hand in such manner as to make it clear, by use of an appropriate disclosure, that the sealed sole is not hand sewn.

[33 FR 3375, Feb. 27, 1968]

§ 15.198 Truckload discount for quantity purchases.

(a) The Commission rendered an advisory opinion involving a 5 percent discount that a manufacturer proposed to offer to all customers purchasing in truckload-lot quantities. The manufacturer requesting the opinion is subject to a cease and desist order prohibiting price discrimination under section 2(a) of the amended Clayton Act.

(b) The manufacturer operates a single factory located in the Midwest and ships its products on a uniform delivered price basis to wholesale customers located throughout the continental United States. The manufacturer desires to pass on to its customers cost savings due to lower freight rates for full truckload-lot quantities, by means of a uniform discount applicable to all truckload orders. For a recent 6-month period, the manufacturer determined that its average freight savings on such orders was in excess of 5 percent. It thereupon requested an advisory opinion as to whether the Commission would approve a uniform 5 percent truckload discount.

(c) The Commission advised the manufacturer that it could not approve the proposed 5 percent discount for truckload-lot orders because, based on the submitted data, the proposed discount would not appear to be uniformly cost justified. Accordingly, the use of such a discount could result in violation of the order in question, by producing price discriminations between customers qualifying for the discount and competing customers not able to qualify for it. The Commission noted that the alleged cost savings depend upon averaging the savings in the freight rates for truckload-lot shipments to all of the manufacturer's truckload customers in the United States and that, although the freight savings increase with the distance of customers from the manufacturer's plant, the freight saving on sales to nearby truckload customers is considerably less than 5 percent.

[33 FR 4137, Mar. 5, 1968]

§ 15.199 Agreement by processors to sell at prices higher than minimum set by State regulation.

(a) The Commission recently rendered an advisory opinion advising a State official that it would be illegal to hold a meeting at which the processors of milk within the State would agree to sell at prices higher than the minimum prices set by the State milk control agency.

(b) The official pointed out that the State milk control agency had performed its function of setting minimum prices pursuant to State law, but that it was felt that it would be difficult for many processors to maintain a profitable operation at these minimums in the outlying areas and towns due to higher delivery costs. The official also advised that this proposed action would not be taken pursuant to State law, but would instead be as a result of voluntary agreement among the processors involved.

(c) The opinion advised that it was the Commission's considered opinion that such an agreement among the processors would be subject to serious question under well-settled principles of antitrust law. The Commission stated the law is clear that a State may, in the exercise of its sovereign power, itself conduct such regulation of business activities within its borders as its own legislature shall properly deem necessary in the public interest. So long as the resulting regulation is a State as opposed to individual activity, those subject to the regulation would not be subject to a charge of violating the antitrust laws by reason of their compliance with the State's orders, including orders setting minimum prices for milk.

(d) Here it appeared that the State, speaking through its milk control agency, had already performed its regulatory function and set minimum prices for milk within its borders. While any individual processor may sell at higher prices if he so desires, for them to combine together to agree to sell at higher prices would, in the Commission's view, present an entirely different question and would be a situation which would enjoy no part of the immunity afforded by State regulation. The prices to be charged within the State may be raised or lowered only by the State itself, the opinion added. They may not be altered by agreement among those subject to the State's regulation without being fully subject to the antitrust laws, under which no principle is more firmly established than that which holds that any agreement among competitors as to the prices at which they will sell is illegal per se.

[33 FR 4137, Mar. 5, 1968]

§ 15.200 Promotion and sponsorship of price catalogs by trade association.

(a) The Commission was requested to render an opinion with respect to an outstanding order to cease and desist which, among other things, proscribed agreements to suggest resale prices. The issue involved the legality of a covered trade association's sponsorship of catalogs for its member-dealers, which, catalogs would contain manufacturers' suggested resale price.

(b) The Commission advised that under an outstanding Commission order covering the trade association and its members such sponsorship by the Association may well violate said order.

[33 FR 4250, Mar. 7, 1968]

§ 15.201 Specialized automotive repair association wants to publish flat rate manual for its members.

(a) The Commission issued an advisory opinion stating that it cannot approve the publication by a specialized automotive repair association of a flat rate repair manual for use by its members in determining labor charges.

(b) The Commission commented that there is implicit too grave a danger that the association's manual would facilitate price fixing between competing repair shop operators. The Commission pointed out the well-established antitrust principle that price fixing by competitors is illegal per se. The public expects to derive benefits from different prices offered by competing service operators.

[33 FR 4250, Mar. 7, 1968]

§ 15.202 Definition of jobbers and wholesalers for functional pricing purposes.

(a) The Commission issued an advisory opinion to an applicant who: (1) Asked for a definition of the words "jobber" and "wholesaler", and (2) asked the Commission's views as to the propriety of a proposed revision in price lists.

(b) In response the Commission stated: "As a working rule, one might suppose that, in a three level system wholesalers are closer to producers and jobbers are closer to retailers in the distribution of a producer's goods. Traditionally, producers sell to wholesalers who sell at a higher price to jobbers who sell at a higher price to retailers.

(c) "The controlling element in your problem, however, as in similar problems arising under the amended Clayton Act, is whether or not resale competition actually exists as between and among these various resellers rather than the names they use to describe themselves. If in fact a so-called wholesaler competes with a so-called jobber in the redistribution of goods, the difference in names is of no consequence; the fact of competition is.

(d) "In *F.T.C.* v. *Ruberoid*, 343 U.S. 470 (1952), the Supreme Court stressed that actual competition in resale operations is decisive rather than nomenclature and approved the Commission's disregard of 'ambiguous labels, which might be used to cloak discriminatory discounts to favored customers.'

(e) "What you plan, as we understand it, is to sell your middlemen, whether 'wholesalers' or 'jobbers', at one price, while selling certain selected retailers at a higher price.

(f) "In the circumstances you present, you may properly do this provided the 'wholesalers' and 'jobbers' are functioning at the same distribution level and are not themselves engaged in retail operations competitive with the selected retailers."

[33 FR 4511, Mar. 14, 1968]

§ 15.203 Common selling organization.

(a) The Commission advised a group of geographically scattered, relatively small public warehousemen that it would not object if they were to establish a jointly owned selling agency under the conditions described.

(b) The Commission understands that the identified public warehousemen propose to establish, as a separate corporation, a single service organization, nationwide in scope. Each participating public warehouseman would periodically provide the service organization with information about the kind of storage space he has available, where such space is available, the times at which such space might be available and the terms and conditions under which such space would be available. The information provided is to be processed by electronic data processing equipment for use by storage space salesmen employed by the service organization. Only generalized information developed by the service organization will be made available to participants jointly.

(c) Each participating public warehouseman is to retain and affirmatively maintain local autonomy in administration, storage, rates, and customers to be serviced. The Commission notes that, under the statutes it administers, each participating public warehouseman is required independently to set his own rates and his own terms and conditions of sale. Any use of the service organization to effect concert of action as to rates, terms, or conditions of sale would expose participants to a charged violation of section 5 of the Federal Trade Commission Act.

(d) The Commission would not object to the establishment of a cooperative enterprise, as above described, operating as above set forth.

(e) The following proviso, however, was added to the opinion: "Unless the Commission has previously rescinded this approval, you are directed that at the end of 3 years from the date of this opinion to submit to the Commission a complete report on your membership, terms and conditions under which the cooperative is operating, including a statement for each member on the sales territory of such member the volume of business and percentage of such members business."

[33 FR 4511, Mar. 14, 1968]

§ 15.204 Use of terms "unconditional" and "lifetime" guarantee.

(a) In an advisory opinion rendered to a watch manufacturer, the Commission ruled that a guarantee which has conditions and limitations, other than as to time, may not be represented as an "unconditional" guarantee. It also advised the requesting party that a guarantee which lasts for only 3 years cannot be described as a "lifetime" guarantee. Moreover, the Commission objected to the guarantee being described as "4-Ever".

(b) With respect to the claim "unconditional", the Commission said that it would be proper to claim that a product is "Unconditionally guaranteed for 3 years" if in fact no other conditions existed. However, where there are conditions other than time, such as were present in the case presented for review, the Commission said that it would be improper under section 5 of the FTC Act to claim that the guarantee is "unconditional". The reason for this, it was concluded, is that the term "unconditional" means there are no conditions attached, and it is a contradiction in terms rather than an attempt at modification to permit use of the claim "unconditional" provided the conditions are disclosed.

(c) Under the terms of the guarantee which was the subject of the Commission's opinion, the purchaser of the watch had the option to renew the original guarantee which expired at the end of 3 years by paying a service fee of $5 on an annual basis. By having to pay the $5 service fee, the Commission said, the purchaser no longer has a "lifetime guarantee" but a service or insurance policy which is renewable at his expense on an annual basis.

(d) The Commission also ruled that it is necessary to disclose the life being referred to whenever it is claimed that the duration of the guarantee is for a "lifetime". For example, is it the life of the original purchaser, the original user, or the life of the product, etc.?

Thus, even if the requesting party resolved the first objection and offered a guarantee for life rather than for 3 years, it would still be necessary to disclose clearly and conspicuously the life to which reference was being made.

(e) In the opinion the Commission also objected to the term "4-Ever" because, contrary to fact, the product was not guaranteed forever.

(f) Finally, the Commission stated that it was not ruling upon the "waterproof" claim because it currently has under consideration a possible revision of trade practice rules relating to the term "Waterproofing" as applied to watches.

[33 FR 5293, Apr. 3, 1968]

§ 15.205 Use of a computer system to collect and disseminate marketing data.

(a) The Commission recently issued an advisory opinion concerning the legality of a proposal to employ computer and data processing equipment to collect and disseminate certain information in connection with marketing of ice-pack broilers. Sellers would feed into the system their asking prices and quantities available, and later report on actual sales, giving the prices and quantities sold. This information would be available to subscribers of the service, whether the subscribers are sellers, buyers, or members of the public. Subscribers would obtain the information by calling in to the central computer. Identity of all parties (sellers and buyers) would be kept secret from each other and from the public.

(b) The Commission advised the applicant that it has no objection to the proposed plan, provided it is not used for some illegal purpose. If the plan is used as a means for fixing or tampering with the price of poultry, or for some other illegal purpose, then the Commission would of course have serious objection to the plan.

(c) The Commission continued:

> Statistical reporting plans which involve the collection and dissemination of data related to future prices are not illegal per se. However, experience in other cases indicates that a price reporting plan which involves future or advance prices, particularly when that plan invites an industrywide pricing policy, may provide the basis for an inference of an agreement or combination to fix prices in violation of section 5 of the FTC Act. In essence, it is the potential danger inherent in the reporting plan which is related to future prices that prompts the Commission to suggest that it be used with extreme care.
>
> Unless the Commission has previously rescinded this approval, you are directed, at the end of 3 years from the date of this opinion, to submit to the Commission a complete report on the actual operation of the program, describing how identity protection was maintained, and to include copies of your printed-out periodic reports and audits.

[33 FR 5294, Apr. 3, 1968]

§ 15.206 Marking requirements for apparel of U.S. components assembled abroad.

(a) The Commission advised an apparel manufacturer that section 4(b)(4) of the Textile Fiber Products Identification Act would require an affirmative disclosure of the particulars of foreign origin under the following facts:

(b) The fabric of which the apparel will be made is entirely of domestic origin. This fabric will be cut into shapes and forms. The cut fabric, together with buttons, trimmings, threads, labels, in short all findings, also of domestic origin, will be shipped abroad to be assembled and sewn into the product. The assembled product will be returned to the United States where it will be finished, pressed, folded, and packaged.

(c) The Commission advised the requesting party that a label or other mark denoting the particulars of foreign origin would be required in the following terms: "Assembled and sewn in [name of foreign country where assembled and sewn] of American-made materials."

[33 FR 5516, Apr. 9, 1968]

§ 15.207 "Made in U.S.A." label on answering machine composed of domestic and foreign made components.

(a) The Commission rendered an advisory opinion in response to a question concerning the origin of a telephone answering machine which was composed of both domestic and foreign made components.

(b) The basic machine is manufactured in a foreign country, but modifications to be performed in the United States, including both labor and parts, will represent approximately 70 percent of the total cost of the finished product. Numerically, approximately half of the components are domestic and the remaining half are imported.

(c) Concluding that such a product should not be unqualifiedly marked as "Made in U.S.A.", the Commission said: "* * * a 'Made in U.S.A.' mark would constitute an affirmative representation that the finished product was made in its entirety in the United States. Since the end product would in fact contain foreign made components of a substantial nature, it would be improper to describe the finished product as 'Made in U.S.A.' without a clear and conspicuous disclosure of the identity and foreign country of origin of the imported components."

[33 FR 5517, Apr. 9, 1968]

§ 15.208 Disclosure of origin of golf clubs made in this country from imported parts.

(a) The Commission was requested to render an advisory opinion concerning the proper labeling as to origin of golf clubs made in this country using imported component parts. The cost of materials and labor in this country with respect to the four clubs in question will range from a low of 63 percent to a high of 92 percent.

(b) The opinion advised that in the absence of any affirmative representation that the products are made in the United States, or any other representation that might mislead the public as to the country of origin, and in the absence of any other facts indicating actual deception, the Commission was of the opinion that under the facts as presented, the failure to mark the origin of these golf clubs will not be regarded by the Commission as deceptive. Accordingly no marking is required on these clubs with reference to the country of origin.

[33 FR 5517, Apr. 9, 1968]

§ 15.209 Disclosure of foreign origin of component used in drawer slide assembly.

(a) The Commission was asked to render an advisory opinion as to the labeling requirements applicable to a slide assembly for cabinet and desk drawers which will be made in this country using an imported rail member. The importer component will make up less than half the cost of the completed assembly.

(b) The opinion advised that in the absence of any affirmative representation that the product is made in the United States, or any other representation that might mislead customers as to the country of origin, the Commission was of the opinion that, under the facts as presented, the failure to mark the origin of the product would not be regarded as deceptive.

(c) However, the Commission was also of the opinion that it would not be proper to describe the completed slide assembly as "Made in U.S.A." since that would constitute an affirmative representation that the entire assembly was made in this country, which is not the fact, unless, of course, the fact is also disclosed in a clear and conspicuous manner that the rail member is imported.

[33 FR 5517, Apr. 9, 1968]

§ 15.210 Disclosure of foreign origin of imported mechanical pencil action.

(a) The Commission rendered an advisory opinion in regard to the question of whether it is necessary to disclose the origin of imported mechanical pencil actions which are to be assembled with an American made barrel and clip.

(b) In the absence of any affirmative representation that the product is made in the United States, or any other representation that might mislead the public as to the country of origin, and in the absence of other facts indicating actual deception, the Commission expressed the opinion that, under the facts as presented, the failure to mark the origin of these goods will not be regarded by the Commission as deceptive.

[33 FR 5517, Apr. 9, 1968]

§ 15.211 Disclosure of country of origin of imported FM tuners.

(a) The Commission was requested to render an advisory opinion concerning the proper marking of small FM tuners imported from a foreign country. The tuners are disassembled in this country and a number of domestic components are installed to replace their foreign counterparts to change the tuning frequency and narrow the bandpass.

(b) With regard to the proposal to omit any statement on the label concerning the origin of the product, and instead to include a brochure with each unit that would accurately explain its origin, the Commission believes that such proposal would not violate any of the laws administered by it.

[33 FR 5517, Apr. 9, 1968]

§ 15.212 No foreign origin disclosure required of imported shower head components.

(a) The Commission rendered an advisory opinion concerning the proper labeling as to the origin of shower head components to be imported from a foreign country. Under the terms of the proposal the imported components will represent approximately 40 percent of the total cost of the completed unit, with American labor and material representing the remaining 60 percent.

(b) In the absence of any affirmative representation that the product is made in the United States, or any other representation that might mislead the public as to the country of origin, the Commission expressed the opinion that, under the facts as presented, the failure to mark the origin of these goods will not be regarded by the Commission as deceptive. Accordingly, the Commission ruled that no marking is required on the imported shower head components beyond what is imposed by the Bureau of Customs.

[33 FR 5660 Apr. 12, 1968]

§ 15.213 Country of origin disclosure on bicycles assembled with some imported parts.

(a) The Commission was requested to render an advisory opinion concerning the proper labeling as to origin of bicycles which were to be produced in the Virgin Islands using parts to be imported from a foreign country together with other parts from the United States. The value of the imported parts in relation to the total value of the finished bicycle will be around 35 percent.

(b) The opinion advised that in the absence of any affirmative representation that the product is made in the United States, or any other representation that might mislead the public as to the country of origin, the Commission is of the opinion that, under the facts as presented, the failure to mark the origin of these bicycles will not be regarded by the Commission as deceptive.

[33 FR 5660, Apr. 12, 1968]

§ 15.214 Country of origin labeling on lamp containing an imported wooden base.

(a) The Commission rendered an advisory opinion concerning the proper labeling as to the origin of lamps containing a wooden base imported from Japan, which represents approximately 20 percent of the total cost of the completed unit. The remaining components will be of American origin and the lamps will be assembled here in the United States.

(b) Two questions were ruled upon by the Commission in the advisory opinion. First, would it be proper to label the lamps as "Made in U.S.A."? Second, if not, must the wooden base be labeled as "Made in Japan"?

(c) In response to the first question, the Commission said that the claim, "Made in U.S.A.," would constitute an affirmative representation that the entire lamp was of domestic origin. Since a substantial portion of the lamp would be of foreign origin, the Commission ruled it would be improper to label the lamps as "Made in U.S.A." without a clear and conspicuous disclosure in the label that the wooden base is made in Japan.

(d) In regard to the second question the Commission said that, if the lamps are not labeled as "Made in U.S.A." and no other representation is used which might mislead the public as to the country of origin, and in the absence of other facts indicating actual deception, under the facts as presented the failure to mark the origin of the goods will not be regarded by the Commission as deceptive. Accordingly, the Commission said that no marking is required on the imported wooden base with reference to the country of origin.

[33 FR 5660, Apr. 12, 1968]

§ 15.215 Misrepresenting hoist as "Made in U.S.A."

(a) The Commission rendered an advisory opinion in response to a question involving the origin of a hoist which is to be made in part of both domestic and foreign made components.

(b) Specifically presented to the Commission was the question of the percentage of domestic material which must be present in the finished product in order for it to be properly described as "Made in U.S.A."

(c) In response to the foregoing question, the Commission said: "* * * a 'Made in U.S.A.' mark would constitute an affirmative representation that the product was made in its entirety in the United States. If the product was made of foreign components and assembled in the United States, it would be improper to describe the finished product as 'Made in U.S.A.' although a legend "Assembled in U.S.A. of [name of country] components' would be proper."

[33 FR 5661, Apr. 12, 1968]

§ 15.216 Affirmative misrepresentation as to origin of photographic accessories.

(a) The Commission rendered an advisory opinion in regard to the proper labeling of the origin of photographic accessories which are imported in whole or in part from a foreign country.

(b) In the opinion the Commission ruled upon the following three questions which were presented to it. First, what percentage of foreign made components can a product contain and still be properly labeled as "Made in U.S.A."? Second, in the absence of a "Made in U.S.A." claim, when is it necessary to disclose the foreign country of origin of an imported product? Third, does the Commission have any specific regulations as to size, material, and location whenever it is necessary to disclose the origin of an imported product?

(c) In response to the first question, the Commission said: "* * * the 'Made in U.S.A.' mark would constitute an affirmative representation that the product was made in its entirety in the United States. If the product did in fact contain foreign made components of a substantial nature, it would be improper to label the finished product as 'Made in U.S.A.' without a clear and conspicuous disclosure indicating the identity of the imported components and the foreign country of origin thereof."

(d) With respect to the second question, the Commission stated that it is somewhat hypothetical in that it does not involve a specific proposed course of action, and therefore it is not the proper subject for an advisory opinion.

(e) In regard to the third and final question, the Commission stated that it had no specific regulations as to the exact size, etc., of the disclosure. The Commission said that it would have to state the rule in general terms because the facts of each case may be different. The basic requirement, the Commission said, is that the disclosure must be of such conspicuousness as to be likely observed by prospective purchasers making casual inspection of the merchandise and of such degree of permanency so as to remain thereon until consummation of the consumer sale thereof.

[33 FR 5661, Apr. 12, 1968]

§ 15.217 Manufacturer may not mark "Made in U.S.A." on imported blades of cutlery finished and assembled in the United States.

(a) The Commission issued another advisory opinion in a series concerning commodities of partial or total foreign origin.

(b) The Commission advised a manufacturer in this country, the applicant for an advisory opinion, that he may not mark "Made in U.S.A." on imported blades of cutlery to be finished and assembled in the United States. The Commission noted that a blade is a significant component of cutlery. The Commission called attention to the danger that the contemplated marking might violate section 5 of the Federal Trade Commission Act.

[33 FR 5790, Apr. 16, 1968]

§ 15.218 Country of origin labeling on food machinery containing imported components.

(a) The Commission rendered an advisory opinion in regard to representations concerning the origin of goods which are produced domestically but which contain imported components.

(b) Specifically, the Commission ruled that food machinery may not be represented affirmatively as being of domestic origin unless it is made in its entirety in the United States.

(c) Under the factual situation presented to the Commission, the requesting party proposes to produce a food machine here in the United States which will contain some components imported from a foreign country. Specifically, the requesting party wanted to know what percentage of the machine must be made in the United States before it can be affirmatively represented as an American-made product.

(d) Although the Commission ruled that such a machine could not be affirmatively represented as being of domestic origin, it further stated the ruling does not prevent the vendor from making a factual disclosure of the percentage of American-made parts as contrasted with the percentage imported, should the vendor desire to make such a representation.

[33 FR 5790, Apr. 16, 1968]

§ 15.219 Disclosure of foreign origin of contents on package bearing name suggesting domestic origin.

(a) The Commission issued an advisory opinion dealing with the failure to disclose the foreign origin of imported switch plates. The package containing the switch plates was labeled with a company name suggesting that the product was of domestic origin.

(b) Under these circumstances, the Commission required that the foreign origin of the product be disclosed in conjunction with the company name.

[33 FR 5791, Apr. 16, 1968]

§ 15.220 Foreign country of origin disclosure on imported tools.

(a) The Commission rendered an advisory opinion in regard to the proper labeling of the country of origin of certain imported tools.

(b) Specifically, the requesting party wanted to know whether it would be necessary to disclose the country of origin on the tools and in advertising.

(c) In the advisory opinion which was issued, the Commission concluded that it would be necessary to disclose the foreign country of origin of the tools in a clear and conspicuous manner at the point of sale. It also ruled that it would not be necessary to disclose the origin of the tools in advertising.

[33 FR 5791, Apr. 16, 1968]

§ 15.221 Foreign country of origin disclosure on imported metal spring clamps.

(a) The Commission rendered an advisory opinion in regard to the proper marking of metal spring clamps imported from a foreign country. The clamps are to be imported in bulk, repackaged and resold in the United States. They will be used to hold glass to the backing of frames, on cardboards and other accessories, in temporary bookbindings, office ledgers, etc.

(b) The Commission advised the person requesting the advisory opinion that it would be necessary to mark the imported clamps with the foreign country of origin in a clear and conspicuous manner.

[33 FR 5791, Apr. 16, 1968]

§ 15.222 Disclosure of foreign origin of component part of ice cream spade assembled in this country.

(a) The Commission was requested to render an advisory opinion with respect to the necessity for disclosing the country of origin of the imported metal portion of an ice cream spade manufactured in this country.

(b) The opinion advised that in the Commission's view the country of origin of the imported metal portion of the ice cream spade should be disclosed wherever the name of the company appears and that it should be disclosed in a clear and conspicuous manner on the package or the ice cream spade itself.

[33 FR 5791, Apr. 16, 1968]

§ 15.223 Necessity for disclosing foreign country of origin of imported gloves.

(a) The Commission was requested to furnish an advisory opinion as to the necessity for disclosing the country of origin of imported gloves which will be packaged in this country.

(b) The opinion advised that in the Commission's view it will be necessary to disclose the country of origin of the gloves in a clear and conspicuous manner at the point of sale.

[33 FR 5791, Apr. 16, 1968]

§ 15.224 Domestic origin marking for product containing foreign made components.

(a) The Commission issued an advisory opinion dealing with the propriety of using the marking "Made in U.S.A." on a product, a significant component of which is in fact manufactured or produced in a foreign country.

(b) The Commission was of the opinion that the proposed marking would constitute an affirmative claim that the product was entirely of domestic origin and such claim would be manifestly incorrect and actionable.

(c) An article assembled or processed in the United States as described, however, might properly be marked "Made in U.S.A." if the marking is accompanied by appropriate qualifying words (e.g. "of 'X' country components" or "of 'X' country materials") provided this additional disclosure is made as conspicuously as the claim "Made in U.S.A." and in close proximity thereto.

[33 FR 5943, Apr. 18, 1968; 33 FR 8446, June 7, 1968]

§ 15.225 Labeling of material composed of leather fibres imported in their entirety.

(a) The Commission rendered an advisory opinion in regard to the legality of the following five terms to label material composed of pulverized leather:

(1) Pulverized Leather.

(2) Reconstituted Leather.

(3) Imported Bonded Leather-Fibres.

(4) Bonded Leather-Fibres.

(5) 100 percent Leather-Fibres.

(b) Imported from Europe, the material will be sold to manufacturers of luggage, handbags and various other leather goods. The pulverized leather will be bonded with an adhesive and coated either with some type of lacquer or vinyl coating.

(c) In its opinion, the Commission ruled that it had no objection to labels which describe the material as "Pulverized Leather" or "Bonded Leather-Fibres." It rejected, however, the term "Reconstituted Leather" since the word "Reconstituted" creates the impression that the material is leather which has been reprocessed in some manner, when in fact it is nothing more than pulverized leather held together by an adhesive.

(d) With respect to the third proposed label, the Commission expressed the opinion that it would be deceptive to use the word "imported" without disclosing the specific country of origin of the material. Even though the word "imported" is not used, the Commission said that it would still be necessary to disclose the origin of the material since it is entirely imported.

(e) According to its opinion, the Commission also ruled that it would be improper to represent that the material consists of "100 percent" leather fibres, since it contains a substantial amount of adhesive as well as being coated either with a lacquer or vinyl coating. The requesting party was further advised, however, that there would be no objection to using a percentage figure which factually portrays the amount of pulverized leather present in the material.

(f) With further reference to the fifth and final proposed label, the Commission stated that the words "Leather-Fibres" either standing alone, or when coupled with the leather appearance of the material, could create the impression that the material is wholly the hide of an animal or at least something more than pulverized leather. To dispel this erroneous impression, the Commission said it would be necessary to use qualifying language, such as "Bonded Leather-

Fibres," "Leather fibres and an adhesive," etc., in connection with the words "Leather-Fibres."

(g) Finally, if the seller decided not to reveal the composition of the material, the Commission pointed out that it would be necessary to disclose that it is not leather by such language as "Not Leather," "Imitation Leather," or "Simulated Leather". The reason for this, the Commission said, is that the material has the appearance of leather, and in order to remove the potential deception inherent through its appearance it is necessary to disclose the fact that it is not leather.

[33 FR 5943, Apr. 18, 1968]

§ 15.226 Necessity for disclosing foreign country of origin of imported honing stones.

(a) The Commission was requested to furnish an advisory opinion as to the necessity for disclosing the country of origin of imported honing stones which will be affixed to plastic handles in this country. The name of the applicant, an American company, would appear on the handle.

(b) The opinion advised that in the Commission's view the country origin of the honing stone must be disclosed in a clear and conspicuous manner on the product itself.

[33 FR 5944, Apr. 18, 1968]

§ 15.227 Necessity for disclosing foreign country of origin of repackaged imported nails.

(a) The Commission was requested to furnish an advisory opinion as to the necessity for disclosing the country of origin of imported nails, which will be imported in bulk and repackaged in this country.

(b) The opinion advised that in the Commission's view the country of origin of these nails must be disclosed in a clear and conspicuous manner on the package in which they are sold and that neither directly nor indirectly could the importer imply that the nails are made in the United States.

[33 FR 5944, Apr. 18, 1968]

§ 15.228 Country of origin labeling on bubble-packed imported switchplates.

(a) The Commission was requested to render an advisory opinion in regard to the proper marking of the origin of imported switchplates, which are to be packaged in a plastic bubble sealed to a display card for resale to the general public.

(b) In the opinion the Commission advised the requesting party that it would be necessary to clearly and conspicuously disclose the foreign country of origin of the imported switchplates on the front of the display card.

[33 FR 5944, Apr. 18, 1968]

§ 15.229 Country of origin disclosure of imported braids used in production of braided rugs.

(a) The Commission was requested to render an advisory opinion with respect to the necessity of disclosing the country of origin of imported braids which are stitched together in the United States to produce a braided rug.

(b) The opinion advised that in the Commission's view there should be a clear and conspicuous disclosure that the rugs were assembled and sewn in the United States of imported materials.

[33 FR 5944, Apr. 18, 1968]

§ 15.230 Foreign country of origin disclosure on mounting cards displaying imported eyelashes.

(a) The Commission was requested to render an advisory opinion concerning the proper labeling as to the foreign country of origin of imported false eyelashes. All of the other components, such as the mounting card, directions for use, plastic box, adhesive, etc., will be made and printed in the United States.

(b) In its opinion the Commission concluded that it would be necessary to disclose the foreign country of origin of the imported eyelashes. The Commission also said that it would be acceptable for the disclosure to be made on the back of the mounting card, provided the disclosure is prominent and conspicuous.

[33 FR 5944, Apr. 18, 1968]

§ 15.231 Foreign country of origin disclosure on containers of repackaged imported chemicals.

(a) An advisory opinion was rendered by the Federal Trade Commission in regard to the question of whether it is necessary to disclose the foreign country of origin on containers of imported chemicals which are repackaged in the United States.

(b) In the opinion, the Commission advised the requesting party that it would be necessary to disclose the foreign country of origin of the imported chemicals on the repackaged containers in a clear and conspicuous manner.

[33 FR 6157, Apr. 23, 1968]

§ 15.232 Foreign country of origin disclosure of imported knife blades.

(a) The Commission rendered an advisory opinion concerning the proper marking of the origin of knife blades imported from a foreign country. The imported blades will be assembled with handles of domestic origin.

(b) The Commission advised the party seeking the opinion that it would be necessary to make clear and conspicuous disclosure of the foreign country of origin of the imported blades.

[33 FR 6157, Apr. 23, 1968]

§ 15.233 Foreign country of origin disclosure of imported radios at point of sale.

(a) The Commission rendered an advisory opinion in regard to the question of whether it is necessary to disclose the foreign country of origin on the container of an imported two-way radio. The equipment itself will be stamped or labeled to denote the foreign country of origin.

(b) Citing the general rule in matters of this nature, the Commission stated that a clear and conspicuous disclosure of the foreign origin of the product must be made at the point of sale. This means, the Commission added, that it may be necessary to make the disclosure on each individual container, if the prospective purchaser does not have the opportunity to inspect the merchandise prior to the purchase thereof in order to be apprised of its origin.

[33 FR 6157, Apr. 23, 1968]

§ 15.234 Labeling partially imported product as "Made in U.S.A."

(a) The Commission rendered an advisory opinion in regard to the question of whether it would be permissible to label the container of a polishing cloth as "Made in U.S.A." if approximately 38 percent of the cost of the finished product is imported from a foreign country, the remainder being of domestic origin.

(b) The polishing cloth is composed of two separate cloths sewn together, one which is impregnated and is used for polishing and the other is untreated flannel which is used as a finishing-off cloth. It is the impregnated cloth which will be imported, and the untreated flannel will be obtained from a domestic source. Because the greater portion of the cost of the finished product is of domestic origin, the requesting party seeking the opinion wanted to know whether it would be proper to label the container as "Made in U.S.A."

(c) In its advisory opinion, the Commission said: "* * * the claim, 'Made in U.S.A.,' would constitute an affirmative representation that the entire polishing cloth was of domestic origin. Since a substantial portion of the finished product is of foreign manufacture, it would be improper to label the container as 'Made in U.S.A.' However, if you wish to do so, you may make the following claim: 'Made in U.S.A. of impregnated cloth imported from * * *'."

[33 FR 6157, Apr. 23, 1968]

§ 15.235 American manufacturer may not place labels "Made in U.S.A." on garments manufactured in this country from imported cloth.

(a) The Commission issued another advisory opinion among several dealing with products of foreign origin or containing significant components originating in foreign countries.

(b) In reply to a request, the Commission advised an American manufacturer that he may not place labels "Made in U.S.A." on garments manufactured in this country from cloth produced in a foreign country. The

Commission noted that the cloth is a significant component of the finished garment. The Commission stated that "Made in U.S.A." means made in the United States of America completely and accordingly cannot be applied where a significant component originates in a foreign country. The Commission suggested that such labels on the proposed garments might violate section 5 of the Federal Trade Commission Act.

[33 FR 6158, Apr. 23, 1968]

§ 15.236 Foreign country of origin disclosure of imported picture components.

(a) The Commission rendered an advisory opinion concerning the proper marking of the origin of various imported picture components. The opinion involved two specific factual situations.

(b) In the first situation, the frame is imported from one foreign country, the picture motif is from another, and the glass, mat, and other finishing of the product is of U.S. origin. Second, all of the components are of domestic origin, except the picture motif which is imported.

(c) In the absence of any affirmative representation that the finished product is made in the United States, or any representation that might mislead the public as to the country of origin, the Commission expressed the opinion that, under the facts as presented, the failure to mark the origin of the imported components in either of the two factual situations would not be regarded by the Commission as deceptive. Accordingly, the Commission ruled that no marking is required on the imported components beyond what is imposed by the Bureau of Customs.

[33 FR 6158, Apr. 23, 1968]

§ 15.237 Foreign origin disclosure on containers of repackaged toy kits.

(a) The Commission rendered an advisory opinion in regard to the question of whether it is necessary to disclose the foreign origin on the container of various imported toys packaged therein.

(b) Under the factual situation presented to it, the requesting party imports plastic articles in bulk which are, whenever possible, marked as to their foreign origin. Moreover, the imported articles are repackaged in the United States for resale, and sometimes domestically made components are added, and at other times components from another foreign country are also added. The imported components come principally from two foreign countries. There is no fixed percentage of imported components in each kit and the amount may vary as much as 1-75 percent, and only a few of the toy kits contain wholly imported components. The toys are sealed in the container and prospective purchasers cannot examine the goods prior to the purchase thereof in order to be apprised of the foreign origin markings thereon.

(c) Based upon its understanding of the facts and because of the special circumstances presented by the product and the packaging thereof, the Commission expressed the opinion that it would be appropriate to mark the container in substance as follows: "Some items or components of items are made in (name of foreign country) and (name of foreign country)."

[33 FR 6534, Apr. 30, 1968]

§ 15.238 Clearance denied for proposed merger of substantial local independent producer of a food product and a leading national processor and distributor of the same product.

(a) In an advisory opinion the Federal Trade Commission denied clearance to a substantial local independent producer of a particular food product to sell its assets or capital stock to a leading national processor and distributor of the same product.

(b) The Commission noted that, while the two companies do not now sell their product in each other's markets, they appear to be potential competitors of each other. The national company appears to rank as fourth largest distributor nationally of the product involved, and first in several cities with very substantial shares of the markets. The local company ranks second among all sellers of this food product in one principal metropolitan market, first there among the independents, and has enjoyed a substantial share of the market for many years. The merger would be a (geographic) market extension for the national company, eliminating each as a potential competitor of the other and removing the local independent from competition. The proposed merger would appear to violate section 7 of the Clayton Act and consequently the Commission must refuse to grant the premerger clearance requested.

[33 FR 6534, Apr. 30, 1968]

§ 15.239 Net weight labeling of mesquite chips.

(a) The Commission rendered an advisory opinion to a manufacturer of mesquite chips, a product designed to flavor food cooked with charcoal.

(b) In the advisory opinion, the Commission dealt with two questions. The first question involved section 5 of the Federal Trade Commission Act and the propriety of such claims in labeling as whether the product will impart "real western barbecue" flavor to food and whether it may properly be labeled as mesquite chips. Second, under section 4 of the Fair Packaging and Labeling Act, is it proper to state the net weight as "32 OZ. (2 LBS.)" if the weight may vary as much as 2 ounces either way after it is shipped into interstate commerce, depending upon the presence or absence of humidity, and the package in fact contains 32 ounces when it is packaged?

(c) Passing upon the first question, the Commission said that it had no objection to the proposed claims in the labeling insofar as section 5 of the Federal Trade Commission Act is concerned.

(d) With respect to the second question, the Commission ruled that the proposed declaration of net weight complies with section 4 of the Fair Packaging and Labeling Act and comes within the variations in stated weight permitted under § 500.22(b) of this chapter. This section permits: "Variations from the stated weight * * * when caused by customary and ordinary exposure, after the commodity is introduced into interstate commerce, to conditions which normally occur in good distribution practice and which unavoidably result in change of weight or measure." In arriving at this conclusion, the Commission said that it has assumed that good distribution practices will be followed in the marketing of the product which unavoidably result in the change of weight in a relatively small percentage of cases, and that an overage is as likely to occur as often as a loss in weight.

(e) The Commission's opinion also advised the requesting party of certain technical requirements of its regulations, such as the location of the declaration of net weight, the exact size of the declaration in relation to the area of the principal display panel, and other information relating to the identity and location of the manufacturer of the product.

[33 FR 6534, Apr. 30, 1968]

§ 15.240 Use of symbols and names having fur-bearing animal connotations in labeling textile fiber products.

(a) The Commission was requested to render an opinion with respect to the labeling of textile fiber products manufactured so as to simulate a fur or fur product.

(b) The requesting party proposed to use a word closely resembling the name of a fur-bearing animal, the fur of which is commonly used in the manufacture of garments, in association with a pile fabric simulating that fur.

(c) In the Commission's view, the use of the proposed term to describe such a fabric would be violative of that part of section 5 of the Federal Trade Commission Act which makes deceptive acts or practices in commerce unlawful.

[33 FR 6535, Apr. 30, 1968]

§ 15.241 Proposed promotional allowance program based on pyramiding sales of customers rejected.

(a) The Commission advised a requesting party that violation of section 5 of the Federal Trade Commission Act would result from the adoption of a proposed sales promotion plan described in essence as follows:

(b) A certain sum of money would be reserved from the proceeds of a sale to a first customer. That customer, if he wished to participate in the sales promotion program, would be paid up to one quarter of the reserved sum as commission on sales to ten additional customers. The first customer would also be paid up to one quarter of the reserved sum on sales made by his customers to yet another generation of customers and so through a fourth generation.

(c) The tabulation distributed to potential purchasers of the requesting party's merchandise showed that the original participant, in theory, might benefit from the efforts of 11,100 salespersons.

(d) This in the Commission's judgment was beyond the realm of possibility. The return to any given participant would unquestionably be a great deal less than the theoretically achievable amount set forth; more often than not it would be negligible. The initial purchaser would not surely benefit, if at all, beyond that amount which he can gain through his own efforts. Any further amount which he might receive would accrue to him sheerly through chance.

[33 FR 6860, May 7, 1968]

§ 15.242 Necessity for disclosing the country of origin of imported ink.

(a) The Commission was requested to render an advisory opinion with regard to the necessity for disclosing the foreign origin of ink which is imported from Germany. The ink is imported in 50-liter drums and resold to the consumer in ¾- and 2-ounce bottles.

(b) The opinion advised that in the Commission's view the country of origin of this ink must be disclosed in a clear and conspicuous manner on the bottles in which it is sold and, if the ink is packaged in separate boxes, on the boxes themselves in such a manner as to be readily seen by prospective purchasers. The opinion added that neither directly nor indirectly could it be implied that the ink is manufactured in the United States.

[33 FR 6860, May 7, 1968]

§ 15.243 Receipt of discount in lieu of brokerage by respondent wholesale food distributor.

(a) A wholesale food distributor under order for having violated section 2(c) of the amended Clayton Act has been advised by the Federal Trade Commission that if he received or accepted a discount offered by one of his suppliers for rendering certain "special services," he would be in violation of order entered against him.

(b) The Commission noted that the 5 percent discount offered to the distributor was equal to commissions normally paid by the supplier to brokers: The services to be rendered by the distributor were services normally performed by brokers in connection with sales to other distributors; other circumstances and statements clearly indicated that both parties to the transaction considered the discount as compensation for elimination of brokerage expense, and the discount therefore amounted to an allowance in lieu of brokerage.

[33 FR 6860, May 7, 1968]

§ 15.244 Disclosure of foreign origin of nasal cannula required.

The Commission recently advised a requesting party that a medical device manufactured in a foreign country from domestic designs and made on domestic machinery furnished by the U.S. seller should be marked clearly and conspicuously with the name of the foreign country. The marking could be on the device itself or on the package but in any event the disclosure must be made or attached with such permanence to remain on the product or container until bought by the ultimate purchaser.

[33 FR 7111, May 14, 1968]

§ 15.245 Commission denies approval of proposed joint venture corporation composed of five competing manufacturers to bid on prime contract to furnish products of uniform specification.

(a) The Commission issued an advisory opinion denying approval of a proposed joint venture corporation to be composed of five manufacturers to bid on a large contract that would require more extensive facilities than possessed by any one of them. The actual work on the contract would be performed by the five participating companies and by others on a subcontract basis. The five are now actual or potential competitors.

(b) In the opinion of the Commission, the proposed joint venture corporation composed of competing companies would appear to be illegal under Federal antitrust laws as a combination to fix prices in contract bids.

[33 FR 7111, May 14, 1968]

§ 15.246 Trade association publication recommending procedures for freight prepayment by manufacturers.

(a) The Commission rendered an advisory opinion informing a trade association of wholesalers that it could not give its approval to a proposal to conduct a study of various policies for prepaying freight being used by manufacturers and to publish the results as a recommended procedure for prepaying freight.

(b) The Association advised that a certain number of manufacturers who sell to its members have a "paid freight" policy whereby they will pay the freight, on one of a number of bases, on orders above a certain quantity which are shipped to the members. Many manufacturers do not have such a policy. Among those that do, there are 15 to 20 different procedures for handling payment, most of which involve a lapse of time of from 60 days to 6 months before the wholesaler can collect the allowance. The Association is interested in conducting a study of these practices with the ultimate view of reducing the 15 or 20 procedures now in effect to perhaps two or three and also to reduce the time period for the recovery of the funds to no more than 60 days, thus eliminating the long period in which capital of the members is tied up in what is supposedly prepaid freight.

(c) The Association stated that these efforts are not in any way intended to coerce manufacturers into giving freight allowances they do not care to give, but are solely to reduce the complexity and cost of doing business. It definitely plans to publish the results as a "recommended procedure for prepaying freight", but does not plan any efforts to enforce this recommendation or to put any pressure on the manufacturers to adopt the recommendation beyond the simple publication of the results of the study and the recommended procedure.

(d) The Commission advised that even though the study and published recommendation may be motivated by a purpose to remove evils affecting the industry, it appears to go further than is reasonably necessary to accomplish such result. Even if unaccompanied by any intent to force the manufacturers to adopt the policies set forth in the recommendation, there is implicit in such recommendation by the wholesalers too grave a danger that it will serve as a device whereby the concerted power of the members of the Association is brought to bear to coerce the manufacturers to conform their pricing policies to the restrictive standards of the recommendation, or at the very least as an invitation to enter into agreements among themselves to do so. The Commission would, however, have no objection to the preparation by the Association of an objective study of these practices for the members of the Association provided the study did not contain any recommendations.

[33 FR 7149, May 15, 1968]

§ 15.247 Disclosure of origin of crib mattresses, etc. made in this country using imported outside covers.

(a) The Commission was requested to render an advisory opinion concerning the proper labeling as to origin of crib mattresses, play pen pads and bumpers which will be manufactured in this country using imported outside covers. The manufacturer advised that the relative manufacturing cost of the imported part to the American parts will be from one-fifth to one-seventh and that a comparison of the cost of the imported sheeting to the selling price will run about one-seventh to one-twelfth.

(b) The opinion advised that in the absence of any affirmative representation that these products are made in the United States, or any other representation that might mislead the public as to the country of origin, the Commission is of the opinion that, under the facts as presented, the failure to mark the origin of these goods will not be regarded by the Commission as deceptive.

[33 FR 7149, May 15, 1968]

§ 15.248 Validation of guarantee—time requirement.

(a) The Commission interpreted for a requesting party one aspect of the Commission's Guides Against Deceptive Advertising of Guarantees. These guides, in general, provide that any guarantee used in advertising shall clearly and conspicuously disclose: (1) The nature and extent of the guarantee; (2) the manner in which the guarantor will perform; and (3) the identity of the guarantor.

(b) The language proposed for the guarantee of a product sold by mail was: "If for any reason you are not satisfied with your purchase, return it to us at once * * *." In the Commission's view the expression "at once" was too vague and accordingly the proposed guarantee did not conform to the guides.

(c) The Commission approved the proposed guarantee when it was modified to read "If for any reason you are not satisfied with your purchase, return it to use within x days", "x" being a number of days certain.

[33 FR 7149, May 15, 1968]

§ 15.249 Trade association code providing that members will not advertise sales below cost.

(a) The Commission rendered an advisory opinion informing a trade association that there could be no objection to its proposed "Guide To Ethical Advertising Practices", with the exception of one provision relating to advertising of sales below cost.

(b) The Guide set forth a number of prohibitions of various advertising practices which the Commission deemed to be in accord with applicable law and the Commission also noted that the association did not contemplate any efforts of its own to enforce the Guide, but instead planned to publish it solely for the education and guidance of the members. The one provision questioned by the Commission provided that since below cost pricing is predicated on additional sales, members shall not advertise merchandise or services or a combination of both below their total cost.

(c) The opinion advised that while the mere adoption and dissemination of this Guide by the association may not be considered the equivalent of an agreement not to advertise below cost prices, still if it had the effect of persuading substantial numbers of the members of the association to refrain from so advertising, it would, the opinion stated, raise a serious inference of such an agreement and hence would be of questionable propriety under the antitrust laws. Since sales below cost can be a legitimate method of competition, depending upon the circumstances, any agreement among competitors to refrain from such advertising to that extent restricts competition. Hence, it was stated that any provisions which would have a tendency to bring about that result could not meet with Commission approval.

(d) The Commission further advised that this conclusion would not in any way be altered by the existence of the many State laws on the subject. These laws vary greatly in their coverage and application and, in any event, would not provide a legal basis for an agreement among the members of an industry to refrain from the practice in question.

[33 FR 7489, May 21, 1968]

§ 15.250 Formation of local trade associations by statewide trade association.

(a) In an advisory opinion disapproving a proposal by a State trade association desiring to establish a statewide network of local clubs or trade associations in the same industry the Commission advised that, on the basis of presented facts, it was unable to determine with any degree of accuracy their precise purpose and objectives.

(b) The advisory opinion pointed out that the Commission does not generally disapprove the proposed formation of industry groups or trade associations for purposes which are not anticompetitive. If the purpose for such formation is the dissemination of information on local or State legislation, the improvement of individual businesses, or the establishment of sound accounting principles and bookkeeping practices or similar activity, the Commission would voice no objection.

(c) If, however, the purpose or effect of such groups and their policies is the unlawful suppression of competition, the promotion of unlawful price stability or so-called orderly marketing practices, their formation could not be approved under any circumstances.

(d) Since these latter effects would not be inconsistent with the general statement of purpose submitted with the factual presentation, the Commission disapproved the proposal in its present form.

[33 FR 7489, May 21, 1968]

§ 15.251 Disclosure of country of origin of imported fasteners.

(a) The Commission was requested to render an advisory opinion with respect to the necessity for disclosing the country of origin of metal fasteners which will be imported from Japan. The fasteners either will be imported in bulk and repackaged in small cardboard cartons in this country or will be packaged in individual cartons in Japan.

(b) The opinion advised that in the Commission's view the country of origin of these fasteners must be disclosed in a clear and conspicuous manner on the package in which they are sold and that neither directly nor indirectly could the importer imply that they were made in the United States.

[33 FR 7488, May 21, 1968]

§ 15.252 Location of foreign origin disclosure.

(a) Responding to a request for an advisory opinion, the Commission said today that the disclosure of the foreign country of origin of imported fishing reels must be made in a location where it would be readily observed by prospective purchasers.

(b) Under the factual situation presented to it in the advisory opinion, the imported fishing reels are plainly marked as to their specific foreign country of origin. It is anticipated, however, that the reels will be packaged for resale in the United States in a vinyl zipper case and then placed inside a cardboard carton. Information as to the exact manner in which the reels will be displayed at the point of sale was not available.

(c) The question presented to the Commission was whether it would be necessary to make the foreign origin disclosure of the reels on the case or the outside of the cardboard carton, or on both.

(d) After pointing out that it could not give a specific answer as to the exact location of the foreign origin disclosure because it had not been advised of the exact manner in which the reels would be displayed at the point of sale, the Commission stated: "Whenever an affirmative disclosure of origin is required in order to prevent deception, the general rule is that the marking must be legible and must be placed in a location where it would be readily observed by prospective purchasers making a casual inspection of the merchandise prior to, and not after, the purchase thereof. This means, of course, that if the reels are displayed at the point of sale in a cardboard carton, a conspicuous disclosure would have to be made on the outside of the carton. A similar disclosure would be required on the vinyl case, if the reels are displayed only in the case. On the other hand it follows that the disclosure on the reels would be sufficient: *Provided*, That the reels are displayed at the point of sale in such a manner that prospective purchasers could readily observe the disclosure thereon prior to the purchase of the merchandise."

[33 FR 7488, May 21, 1968]

§ 15.253 Extended credit terms for newly established stores in impoverished urban areas approved.

(a) The Commission advised an apparel manufacturer that under the circumstances described his proposed plan would not likely contravene laws administered by the Commission.

(b) The manufacturer proposes to give extended credit terms to one class of his customers, excluding other classes. Those to whom extended credit are to be given are described as follows:

(1) The business is a newly established business located within an urban, inner core, ghetto-type area.

(2) The proprietor or principal owner of the business is a resident of the urban, inner core, ghetto-type area within which the business is located.

(3) In light of its ownership, management, and location the business stands a reasonable chance of survival.

(c) To such customers the following extended credit terms will be offered:

(1) One year's credit on orders placed during the first month of operation.

(2) Six months credit on all orders placed thereafter.

(d) The extended credit given is to be limited to the first 5 years of a new store's operations. It was also proposed that such new firms be given on an introductory basis certain in-store and point-of-sale advertising materials, not to exceed in total value (i.e., cost to the requesting party), the sum of $500.

(e) The Commission felt that there would be little, if any substantial competition between the favored and disfavored customers.

(f) The Commission announced that it would not, currently at least, challenge the requesting party's proposal.

(g) The Commission noted further that if changed circumstances required a change in the Commission's present views, the requesting party would be given ample opportunity, as provided by the Commission's rules of practice, to modify or abandon, without penalty, the presently approved proposal.

(h) One year subsequent to the initiation of this program the requesting party was requested to submit to the Commission a report describing the details of the implementation of the plan together with any objections it may have received.

[33 FR 7720, May 25, 1968]

§ 15.254 Operation of exclusive check-cashing concessions in retail stores.

(a) The Commission rendered an advisory opinion to the effect that it would not be illegal for a company to operate proposed check-cashing program pursuant to which it would function as the check-cashing concessionaire within subscribing retail establishments.

(b) Under the plan as presented, the company would charge check-cashing customers a 10-cent fee for all checks drawn for sums greater than the amount of the purchase and would pay to the subscribing retailers a portion of that fee as consideration for the grant of concession rights. The company would assume the entire burden of bad-check risks and collection efforts.

(c) The subscribing retailers and their employees would act as agents of the company by performing the actual check-cashing function, following procedures required by the company and utilizing the company's information system. Money used in cashing checks for sums greater than the amount of the purchase would be the retailers' money and the retailers would deposit all checks and fees collected by them in their own banks. Out of the fees so collected and deposited, the subscribers would remit to the company 7 cents per check cashed, including checks drawn in the amount of the purchase, although no fee would be charged the customer for such such checks. The company would pay the subscriber the full amount of all bad checks and would assume the function and risks of attempting to collect on such checks.

(d) The subscribing retailers would retain the difference between the amount paid the company and the aggregate fees collected as their basic consideration for granting the concession rights and could realize additional consideration from a reserve to be maintained by the company. The company would run its own credit check of all applicants for and holders of check-cashing courtesy cards, issue cards inscribed with the retailer's name, keep the credit information up to date and operate, using moneys and employees of the subscriber and at locations within subscriber's outlets, check-cashing concessions which would be furnished with on-line telephone reports of information contained in the company's records.

(e) The agreements to be executed with the subscribers would give the company the exclusive check cashing concession rights within the stores for a period of 24 months, subject to an initial right of cancellation by the subscriber at the end of the first 5 months. The only cost to the subscriber in exercising this latter privilege would be the loss of the initial set-up charge paid upon installation of the concession in the store. After the expiration of the 24-month period, the agreements would be renewable for 1-year periods at the option of the parties. The company also advised that to its knowledge no one else is presently engaged in operating such check-cashing concessions.

(f) The company expressed primary concern with two legal issues created by this proposed plan. The first had to do with whether the company's separate agreements with subscribers, each providing for the collection of a 10-cent fee, would be deemed a horizontal price-fixing conspiracy. Second, the company inquired as to whether the exclusive aspect of the agreements makes them objectionable under section 5 of the Federal Trade Commission Act.

(g) With respect to the first question, the opinion advised that in the Commission's view, based upon the facts presented, the only price involved is the company's own price for the service rendered and hence no question of a price-fixing agreement should arise. With regard to the second question, the Commission was of the opinion that the time periods involved in these exclusive agreements should not result in unreasonable restraints of trade considering the fact that this is a small company seeking to establish itself in a new field of endeavor where there are no existing competitors and where a substantial outlay of capital and the assumption of considerable risk will be required. Here, the Commission was influenced by the fact that subscribers have the opportunity to terminate the arrangement at the end of the first 5 months and again at the expiration of the 24-month period and that renewals will be for 1-year periods only.

(h) The Commission cautioned that this opinion was being rendered in the light of the competitive situation which now exists and that in that light it could see no objection to the form of the agreements and the proposed manner of implementing the program. The Commission could not, of course, foresee in all particulars the impact of this program upon future competitive conditions which might conceivably require a different view of the exclusive provisions contained therein.

[33 FR 7881, May 30, 1968]

§ 15.255 Misrepresentation as to origin of flatware.

(a) The Commission rendered an advisory opinion in regard to the proper marking of the origin of flatware which is imported in substantial part. Specifically, the following three questions were ruled upon by the Commission.

(b) First, can flatware which is gold plated in the United States be marketed without disclosing the foreign origin of the imported stainless steel blanks, if it is sold under a trade name consisting of a company name suggesting domestic origin hyphenated with the word "American"? (The gold plating will cost from 30 percent to 50 percent of the total cost of the finished product.)

(c) Second, if the trade name referred to above in the first question is not used, will it then be necessary to disclose the foreign origin of the imported stainless steel blanks?

(d) Third, if a disclosure is required, must it be stamped on the flatware itself or can it be placed on a string tag attached to the flatware or on the container?

(e) In response to the first question, the Commission said that the use of the proposed trade name would constitute an affirmative representation, contrary to fact, that the entire product was made in the United States. Since a substantial portion originates in a foreign country, it will then be necessary to clearly disclose the country of origin of the imported stainless steel blanks in immediate connection with the trade name wherever it is used, both in advertising and labeling.

(f) In response to the second and third questions, the Commission said that disclosure of the origin of the imported components would be required even though the company elected not to market the flatware under the proposed trade name. The Commission also stated that the disclosure may be made on the flatware itself, or on a string attached thereto, or on the container, provided the disclosure is of that degree of conspicuity and permanency as will likely be observed by prospective purchasers making a casual inspection of the merchandise prior to, not after, the purchase thereof.

[33 FR 7882, May 30, 1968]

§ 15.256 Use of unqualified word "Diamond" to describe abrasive discs containing other materials.

(a) The Commission was requested to render an advisory opinion concerning the legality of describing abrasive discs or laps containing diamond and other abrasives as "Diamond Discs".

(b) The manufacturer presently produces diamond coating laps which are a single layer of diamond held in a plated nickel bond and uses only diamond as the abrasive. It now plans to produce a companion product line and add another abrasive particle as a filler. For example, it would mix aluminum oxide with the diamond, with the ratio of diamond to aluminum oxide being as low as one to ten and, in any event, the filler would be more than 50 percent.

(c) The opinion advised that in the Commission's view such as abrasive disc of lap could not truthfully be described as simply a "Diamond Disc." The opinion further advised that nothing in the law would prevent use of the word "Diamond" as part of a truthful description of the product, but that if the manufacturer did elect to use it, considering the low percentages of diamond which were contemplated, it should only be used as a part of a full disclosure of all the abrasive materials used, including the percentages of each.

[33 FR 8539, June 11, 1968]

§ 15.257 Legality of trade association suggesting rental rate for containers in which industry products are sold.

(a) The Commission was requested to render an advisory opinion concerning the legality of a trade association suggesting a rental rate for the containers in which the product of the industry is sold if such rate is lower than the standard charge now being made.

(b) The members of the association are engaged in the sale of a product in returnable containers many times the value of the product itself. The practice in the industry today is to charge a daily or monthly rental for the time during which the containers are held beyond 30 days. Some of the members would now like to go to a straight rental and feel the best way to do this would be through the association.

(c) The Commission advised that implementation of this proposal by the association would be likely to result in a violation of law without regard to the ultimate rental set, whether higher or lower than the existing rate. Even though couched in the form of a suggestion, the natural and probable result of such an action would, the opinion stated, be to persuade substantial numbers of the members to charge the rate suggested, thus leaving an almost inescapable inference of an agreement among competitors to charge a common rate. Such an agreement would be a clear restraint of trade under existing law, the Commission added.

(d) It was the Commission's opinion that the rental rates to be charged by the members should be determined by the natural forces of competition, not by concerted activity on the part of the members acting through their trade association or otherwise.

[33 FR 8539, June 11, 1968]

§ 15.258 Promotional assistance plan limited in value to percentage of purchases.

(a) The Commission approved, with modifications, a proposed promotional assistance plan.

(b) The requesting party will be offering cooperative advertising allowances under the program in question for a limited period of time. The dollar value of the allowance offered is to be measured at 12 percent of the dollar value of a particular account's purchases for the calendar year 1967. Certain new accounts will also be able to participate, if they will. The 12 percent limitation for new accounts will be based on an estimate of the annual dollar volume of business reasonably to be expected from such new accounts.

(c) The offer specifically provides for an allowance of 60 cents per unit purchased.

(d) The requesting party will require the following performance from those accepting its offer:

(1) The product must be promoted with an advertised price that is below normal shelf price.

(2) The ad must be at least 3 column inches.

(3) The advertisement must run in all paid circulation newspapers normally used by the Account, and in no event may those newspapers cover less than 75 percent of the Account's marketing area.

(4) Eligible advertising must be an integral part of the Account's omnibus advertisement and not set apart from the regular advertisement.

(5) Advertisement must run before a specified date.

(6) Advertising placed under this agreement will not be accepted as performance under any other cooperative advertising program for the same period.

(7) If the account is unable to utilize newspaper advertising, a representative should be contacted to arrange for an alternative proportionately equal method of performance.

(e) Proof of performance under the offer will be required from participants.

(f) Notwithstanding the statement of the requesting party that the offer will be made to "certain" new accounts, the Commission understands that the offer will in fact be made to all entitled customers. Furthermore all customers who in fact compete on the same functional level will be afforded an opportunity to participate whether they buy direct from the requesting party or through an intermediary.

(g) The plan as above outlined was acceptable to the Commission provided promotional funds are not disbursed in excess of the actual cost of the advertising. Without such a limitation larger participants in the promotion, buying in larger quantity, might enjoy a cash overage not available to smaller competitors thereby occasioning possible violation of sections 2 (a) or (d) of the amended Clayton Act.

[33 FR 8539, June 11, 1968]

§ 15.259 Commission has no objection to proposed merger of two noncompeting quarry and building materials companies.

(a) The Commission issued an advisory opinion telling applicants it has no objection to their proposed merger.

(b) According to the information submitted in connection with the application for an advisory opinion, the two companies do not sell to the same customers nor do they sell in the same geographic markets in their distribution of certain building materials. Both companies are of modest size.

[33 FR 9287, June 25, 1968]

§ 15.260 Synthetic emeralds.

(a) Responding to a request for an advisory opinion, the Commission took the position that it would be improper to use the term "X Grown Emeralds" as descriptive of synthetic stones.

(b) In expressing the opinion that the proposed phrase would not constitute a proper disclosure of the nature of the product and the fact that it is not a natural stone, the Commission said: "This conclusion is based upon the belief that most consumers would probably ascribe to the word 'grown' its more commonly accepted meaning, namely, one of natural growth, and thus conclude, contrary to fact, that the product is a cultured stone. Under these circumstances, therefore, the Commission is of the opinion that use of the proposed term would not be in compliance with section 5 of the FTC Act because the stones are synthetic, not cultured."

[33 FR 9287, June 25, 1968]

§ 15.261 Promotional assistance based on percentage of purchases during a fixed time period.

(a) The Commission was requested to render an advisory opinion with respect to the legality of a supplier's proposed promotional program under an outstanding Commission order which, in pertinent part, prohibits the supplier from making promotional payments to its customers in a discriminatory manner. According to information provided by the supplier, all its sales are made to retailer customers—distributors or other intermediaries are not utilized in the distribution of the supplier's products.

(b) Under the proposed program as set forth and explained by the supplier, promotional allowances would be made available to all customers of the supplier and could be applied by the customers to the costs incurred by them in three categories of advertising and promotional activity: Point-of-sale materials, cooperative advertising in daily and Sunday newspapers listed in Standard Rate and Data; and so-called other store promotions, including advertising in newspapers not listed in Standard Rate and Data, catalog and local radio and TV advertising, envelope stuffers, and sales incentive programs and contests.

(c) Further, the amounts of such allowances would be determined at the rate of 7 percent of each participating customer's net purchases from the supplier in a 6-month period, although this figure could be adjusted within any given trading area (defined by Management Survey of Metropolitan County Areas) as operating experience requires. In the case of Standard Rate and Data newspapers, the allowances could be applied to two-thirds the cost of such advertising, and for all other forms of eligible advertising and promotional activity, allowances could be applied to the full cost of the activity. In all cases, and whether any customer chooses to participate in any or all of said categories of advertising and promotional activity, the supplier's total contribution to the customer's costs would be subject to the 7 percent of purchases limit. Allowances earned but not used by any customer in a 6-month period could not be carried forward to the following such period.

(d) Regarding the point-of-sale materials, the supplier would mail or deliver quantities of these materials to all customers, and each customer would be advised in advance that such point-of-sale materials would be charged against his available promotional and advertising allowances, unless returned to the supplier within ten (10) days of receipt, by mail or delivery to the supplier's salesman.

(e) The supplier was advised that the proposed promotional program, if implemented in a nondiscriminatory manner, would not be in violation of the Commission's order or section 2(d) of the Clayton Act.

(f) The Commission cautioned that its opinion was predicated upon the supplier's assurance that all provisions of the proposed program, particularly that concerning the availability of cooperative advertising allowances for advertising in non-Standard Rate and Data newspapers, providing only that such newspapers have verifiable costs and circulation, and that concerning the return privilege regarding point-of-sale materials which would be mailed or delivered to the supplier's customers, would be effectively communicated to all customers of the supplier.

(g) The Commission further cautioned that a customer who is located on the periphery of a particular trading area and who competes in fact with a customer located within such trading area, should be offered the particular promotional plan available to the customer within the trading area so as to preclude discrimination between customers competing in the resale of the supplier's products.

[33 FR 9605, July 2, 1968]

§ 15.262 Use of manufacturers' suggested retail prices accompanied by a disclaimer.

(a) The Commission was recently requested to render an advisory opinion as to the propriety of an advertisement referring to a product as "$1.09 size, for 69¢" accompanied by a statement that "All regular prices are the manufacturers' suggested retail prices and are furnished here to help you identify the size being offered for sale."

(b) The opinion advised that the answer to this question depended wholly upon whether or not the prices used as the basis for comparison complied with Guide III of the Guides Against Deceptive Pricing, since, in the Commission's view, the use of the phrase "$1.09 size" in the body of the advertisement and the reference to "manufacturers' suggested retail prices" in the statement place the representation in the category of a trade area price comparison. Therefore, the opinion added, unless the higher prices used do in fact represent the prices at which substantial sales are made by the principal retail outlets in the area, their use would be deceptive.

(c) The Commission further stated that it was of the opinion that the capacity of such advertisements to deceive would not be relieved or removed by the statement or disclaimer proposed in situations where the prices used do not meet the test of the guides. At best, such a statement would simply render the advertisement ambiguous and leave it subject to two interpretations, one of which is false. It would still leave substantial numbers of consumers under the impression that the higher prices used were in fact the actual trade area prices within the meaning of the guides.

[33 FR 9606, July 2, 1968]

§ 15.263 Lower price to "stocking" dealers.

(a) The Commission rendered an advisory opinion in which it said that it could not give its approval to a plan whereby manufacturers would give a lower price to "stocking" dealers who compete with "non-stocking" dealers. The opinion was given to a trade association which represents manufacturers of a household product.

(b) As justification for the variance in the proposed pricing schedules, the association pointed out that "stocking" dealers experience a higher cost of doing business and, therefore, must sell at higher prices than their competing "non-stocking" dealers. It was also contended that such a price differential would stimulate the purchase of the product in question for inventory.

(c) Expressing the view that it could not give its approval to such two price schedules if the "stocking" and "non-stocking" dealers compete and if the pricing differentials are of sufficient magnitude to adversely affect competition, the Commission concluded that the proposed plan could result in illegal price discrimination under section 2(a) of the Clayton Act, as amended. In its opinion, the Commission went on to point out that such price differences would be illegal unless they could be justified on the basis of one of the specific defenses provided in sections 2 (a) and (b) of the statute.

(d) "For example," the Commission said, "the law permits price differences which can be justified by provable cost differences in the manufacture, sale, or delivery of such products resulting from the differing methods or quantities in which the products are sold or delivered. Accordingly, section 2(a) does not preclude prices reflecting less costly and, therefore, more efficient methods of distribution provided that the standards inherent in the statute's cost justification proviso are met."

(e) Although the party seeking the advisory opinion did not raise the question, the Commission's opinion touched upon another point of interest in this type of a situation. Specifically, the Commission said: "* * * it is conceivable that certain members may wish to compensate their customers for services which the customers may render for them in connection with the handling or resale of products manufactured by such members. The law provides a means by which this may be done, but if it is done, the manufacturer must comply with the requirements of section 2(d) of the Act. This requirement is simply that compensation for such services, if made by a manufacturer to one customer, must be made available on proportionally equal terms to other customers of that manufacturer who compete with the favored customer in the sale of the manufacturer's products. This means, among other things, that any plan or program, under which the payments are made must, if necessary, provide for alternative services or facilities which, as a practical matter, can be provided by all competing customers."

(f) Concluding its opinion, the Commission cautioned as follows: "It should be noted, however, that payments by manufacturers to their customers 'to stimulate the purchase of their goods for inventory,' are not payments of the type contemplated by section 2(d). Such a payment would merely be a reduction in price to induce the purchase of the manufacturer's goods and, if given to some but not all of the manufacturer's customers, might be unlawful price discrimination within the meaning of section 2(a)."

[33 FR 9815, July 9, 1968]

§ 15.264 Stocking, quantity, and cumulative discounts.

(a) The Commission rendered an advisory opinion to a manufacturer of food serving equipment which involved a proposal to use stocking, quantity, and cumulative price discounts.

(b) Under the first category, a discount of 50 percent and 15 percent would be given to stocking dealers who continually order in large quantities and maintain a regular stock of the product in question for local delivery to restaurants, hospitals, etc.

(c) The second category involves the following quantity discount schedule to dealers based upon each order:

Amount purchased	Discount
1-11 dozen	50 percent
11-24 dozen	50 percent and 5 percent
25 and more dozen	50 percent and 10 percent

(d) Each dealer will receive the following additional cumulative volume discount at the end of each year based upon the total dollar volume of purchases for that year.

Annual purchases	Discount (percent)
$1-$3,499	0
$3,500-$5,999	1
$6,000-$8,499	2
$8,500-$10,499	3
$11,000-$14,999	4
$15,000-Up	5

(e) Stocking dealers will be in competition with nonstocking dealers and nonstocking dealers will also compete with each other. Under the terms of the proposed pricing schedules, stocking dealers could get a price advantage of as much as 15 percent over nonstocking dealers, and nonstocking dealers could also receive up to 15 percent price advantage over their nonstocking competitors.

(f) After making a brief explanation of the requirements of section 2(a) of the amended Clayton Act, the Commission advised the requesting party as follows: "It is, of course, impossible to reach a definitive conclusion as to the economic impact of such a pricing proposal without an investigation. However the Commission has given your request careful consideration, and it has concluded that it cannot give its approval to the proposal because it believes that the necessary ingredients are present from which it can reasonably infer that such a proposal would likely result in the anticompetitive effects proscribed by the statute. A pricing schedule which results in a price advantage of as much as 15 percent under the facts outlined in this case would therefore probably be illegal, unless it can be justified by provable cost differences in the manufacture, sale, or delivery of such products or unless the lower price is made in good faith to meet an equally low price of a competitor."

[33 FR 9815, July 9, 1968]

§ 15.265 Personal deodorant spray.

(a) The Commissioner rendered an advisory opinion to a manufacturer of a personal deodorant spray concerning the legality of some proposed advertising.

(b) Specifically, the Commission advised the requesting party that the product was not a drug but a cosmetic, nor had it been cleared, approved, or endorsed by the Food and Drug Administration. Therefore, any claims which represent the product as a drug, or that it has been cleared, approved, or endorsed by the Government agency in question would be improper.

(c) Based upon all the facts and scientific information available to it, the Commission also advised the requesting party that any advertising representations which go beyond the claim that the product inhibits the growth of body odor causing bacteria would violate sections 5 and 12 of the FTC Act.

(d) Finally, the Commission stated that, as a general rule, it would be inclined to question the use of any claim that a product is "new" for a period of time longer than 6 months.

[33 FR 9816, July 9, 1968]

§ 15.266 Magazine sponsored contest to win a house.

(a) The Commission rendered an advisory opinion advising a magazine publisher that there would be no objection to a proposal to give purchasers or readers the opportunity to participate in a contest to win a house if implemented in the manner outlined below.

(b) The plan as presented was to give the reader, whether a purchaser or not, the opportunity to participate in a competitive contest to win a house. The contestant was to send in a numbered coupon clipped from the magazine with a written answer of 50 words or less to a question as, for example, "Why do I believe in democracy?" The answer was to be judged by an independent panel, with the best essay being declared the winner. The contest was to take place every 3 months, at a prefixed date, in a public community event. The purpose of the number was to identify the contestant, with the judges knowing only the numbers of the participants and not their names.

[33 FR 10205, July 17, 1968]

§ 15.267 Legality of describing green tourmaline as "Emerald Green Tourmaline" or "Precious Tourmaline".

(a) The Commission was requested to render an advisory opinion as to the legality of describing green tourmaline as "Emerald Green Tourmaline" or as "Precious Tourmaline". The stone involved in the request was said to contain chromium, the same coloring agent which produces emerald when it occurs in beryl, and the stone resembled emerald in appearance.

(b) The Commission advised that it was of the opinion that the words "emerald" and "precious" may not be used in connection with the word "tourmaline" to describe the stone in question.

[33 FR 10205, July 17, 1968]

§ 15.268 Agreement not to advertise prices.

(a) The Commission rendered an advisory opinion in which it stated that a joint agreement among competitors to refrain from price advertising would constitute a violation of section 5 of the Federal Trade Commission Act.

(b) The request which prompted the Commission's opinion stemmed from a proposal to use the following language in an association's standards of ethics: "Advertising of rates or comparison of competitor's rates or charges, is prohibited on the basis that such advertising demeans the profession."

(c) The present code now in effect uses the word "discouraged" in lieu of the word "prohibited."

(d) In ruling that such a provision would be illegal, the Commission said: "* * * since price difference and price comparison may be valuable stimulants to competition, any agreement to suppress the advertising of the two would constitute an agreement in restraint of trade violative of section 5 of the Federal Trade Commission Act."

(e) "Moreover, as to the present use of the word 'discouraged' in the code now in effect, you are informed that any agreement to 'discourage' advertising of rates or rate comparison would also be in restraint of trade and violative of section 5 of the Federal Trade Commission Act. The Commission is aware that you have not requested this advice, and indeed under the Commission's rules an advisory opinion is usually considered inappropriate because the practice is one which is already engaged in; however, since your adoption of this rule has come to the attention of the Commission, the Commission would be remiss in not suggesting its discontinuance."

[33 FR 10206, July 17, 1968]

§ 15.269 Pooling of allowances for purposes of joint advertising.

(a) The Commission was requested to render an advisory opinion concerning the legality of a proposal by a group of independent retailers to pool the advertising allowances due the members for purposes of joint advertising.

(b) Under the proposal, all money earned by the members under the suppliers' cooperative advertising programs would be assigned to the group in a collective advertising effort for the suppliers. Each supplier would receive, on the basis of the amount of money earned from him by all members of the group, radio advertising through the medium of 3 minute programs, each of which would have 1 minute of time available for the suppliers' commercial messages. The content of the 1 minute commercial would be governed by the suppliers themselves and would not be connected in any way with the retailers' advertising.

(c) As part of the proposal, for each program a supplier receives the retailers would receive broadcast time on the same stations for their message, which would be institutional in nature and would extol the advantages of dealing with independent retailers. Under this type of advertising program, it would not be possible to mention individual dealers nor will prices be mentioned in such advertising.

(d) The opinion advised that the Commission could see no objection to the proposal on the understanding that the fund used by or on behalf of the participating group to purchase advertising space will consist only of the aggregate of advertising allowances properly available to the members individually under the terms of section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act. In brief, that section prohibits the payment by sellers of allowances to some customers which are not made available on proportionally equal terms to all competing customers. In this connection, the opinion further advised that it would be unlawful if the combined power of the group was used to induce from the suppliers allowances greater than those to which the individual members were entitled under such section.

[33 FR 10206, July 17, 1968]

§ 15.270 Necessity for disclosing country of origin of imported ski.

(a) The Commission was requested to render an advisory opinion as to the marking requirements applicable to a ski which is imported from abroad in an unfinished state and which would have to have the decal and the top finish applied in this country, as well as the final process for finishing the bottom or the running surface.

(b) The opinion advised that in the Commission's view it will be necessary to disclose the country of origin of this ski in a clear and conspicuous manner to prospective purchasers at the point of sale.

[33 FR 10206, July 17, 1968]

§ 15.271 Adoption of penalty clause which inhibits competitors.

(a) The Commission advised a requesting party that his proposal, if adopted, would violate section 5 of the Federal Trade Commission Act.

(b) The plan and its background were described as follows:

(1) It is customary in the specified market for sellers of components furnished by a single supplier to offer free design services to architects and engineers engaged in planning new construction.

(2) When the contracts are let, however, that seller of components who has provided the free design services is not always the successful bidder.

(3) It was proposed, therefore, that the supplier contract and agree with all whom he supplies that a money penalty be imposed on any successful bidder who had not provided the free design services. The prescribed penalty would be paid over to that unsuccessful bidder who in fact provided free design services, failing which the supplier might at his option, cut the offending bidder off.

(c) The Commission noted that any direct, or indirect, agreement between competitors which interferes with the free establishment of a market price whether that price be expressed in money service, or in any other manner, is unlawful.

[33 FR 11701, Aug. 17, 1967]

§ 15.272 Sales promotion plan—opportunity to buy at a savings.

(a) The Commission approved a proposed sales promotion plan described as follows:

(1) The requesting party proposes to offer major oil companies its services in the promotion of the retail sale of gasoline. Participating gasoline stations will be provided with 3 x 4 cards picturing some product, most probably a nationally advertised appliance. These cards will be distributed gratis to those who wish to have them. No purchase of any kind will be required.

(2) The appliance pictured on the card will be offered for sale at a price substantially less than the price at which it is ordinarily available through customary retail outlets. The holder of the card may obtain the appliance by sending the card with remittance to a designated post office box. His purchase will be mailed to him. A purchase may be made without a card if remittance is accompanied either by a facsimile of the appliance or a word description thereof.

(b) The plan was approved on the assumption that the offered savings would in fact be available as prescribed in the Commission's Guides Against Deceptive Pricing.

[33 FR 11701, Aug. 17, 1968]

§ 15.273 Publication by trade association of suggested resale price schedule for materials.

(a) The Commission rendered an advisory opinion advising a trade association of independent shops engaged in rendering repair service that its proposal to disseminate a suggested resale price schedule for materials used would be likely to result in a violation of law.

(b) The schedule in question consisted of two tables, one of which gave the shopowner a quick reference to suggested resale prices for materials and the other of which gave him an explanation of the total by itemization of each resalable product. The schedule explained that after hours of study it was found that computing labor and materials charges by allowing a price for each hour of labor was very unfair to the shops and far below their cost of materials. Hence the schedule gave the shop a quick method of computing the price of materials to which would be added the cost of labor.

(c) The Commission advised that implementation of this proposal by the association would be likely to result in a violation of law. Even though couched in the form of a suggestion, the natural and probable result of such an action by the association would be to persuade substantial numbers of the members to charge the prices suggested, thus leaving an almost inescapable inference of an agreement among competitors to charge a uniform price for materials. Such an agreement, the Commission stated, would be a clear restraint of trade under existing law.

(d) It was the opinion of the Commission that the prices charged by the members for materials should be determined by the natural forces of competition, not by concerted activity on the part of the members acting through their trade association or otherwise.

[33 FR 11701, Aug. 17, 1968]

§ 15.274 Proposal to reduce discounts granted small volume purchasers.

(a) The Commission rendered an advisory opinion in which a distributor of leather specialty goods was informed that a proposed merchandising plan under which those customers whose annual purchase volume is less than an arbitrary and fixed amount would be granted a smaller discount than would be granted those whose purchases exceed such amount cannot be approved because it appears on its face to violate section 2(a) of the amended Clayton Act if it were put into operation.

(b) The proposed merchandising program will continue the current discount of 50 percent off list to those whose annual purchase volume exceeds $250. All other accounts will be granted 40 percent discount on orders of less than $200 list and 50 percent discount on orders over this amount until their cumulative purchase volume reaches $500 list at which time each will receive a retroactive rebate adjustment on past purchases and the current discount on subsequent purchases. A service charge of $2 is to be charged on orders of less than $20 net.

(c) The Commission further pointed out that price discriminations to customers who in fact compete with each other in the resale of commodities of like grade and quality would violate section 2(a) of the amended Clayton Act unless cost justified or unless the lower price is a good faith meeting of a competitor's equally low price.

[33 FR 11701, Aug. 17, 1968]

§ 15.275 Necessity for disclosing country of origin of imported watch bands.

(a) The Commission was requested to furnish an advisory opinion as to the necessity for disclosing the country of origin of watch bands which will be assembled in the Virgin Islands wholly from parts imported from Hong Kong.

(b) The opinion advised that in the Commission's view the country of origin of these watch bands must be disclosed in a clear and conspicuous manner either on the bands themselves or on the packages in which they are sold.

[33 FR 11702, Aug. 17, 1968]

§ 15.276 Disclosure of foreign assembly not required for product made of domestic components.

(a) The Commission advised a requesting party that in the absence of facts indicating actual deception disclosure of the foreign assembly of a product made of domestic components would not be required.

(b) The domestic components accounted for approximately 90 percent of the manufacturing cost of the finished product; foreign assembly accounted for approximately 10 percent of the cost of the finished product.

[33 FR 11986, Aug. 23, 1968]

§ 15.277 Formation of consumers savings group.

(a) The Commission was requested to render an advisory opinion as to the legality of a proposed method of organizing and operating a consumers savings group.

(b) Under the facts as presented, certain select merchants in a town would agree to give designated cash savings to the members of the group upon the purchase of merchandise for cash, which would be a percentage of the purchase price. This savings would not be paid directly to the consumer at the time of purchase, but would be remitted to the group and held in reserve to be disbursed on a cyclical basis. The group would retain no portion of the member's savings, but would earn its profits solely from the fee charged for the consumer's membership in the group and from interest earned on the funds while they were being held for the consumers.

(c) The Commission advised that it could see no objection to the operation of the group in the manner stated provided the purchase prices to be charged the consumer on which his percentage savings were to be computed were in fact the retailers' own former prices for the articles sold within the meaning of Guide I of the Guides Against Deceptive Pricing. In the Commission's view, the entire proposal was based on an assurance to consumers that they would save a stated percentage of the purchase prices actually paid and that those prices would be the regular prices customarily charged by the retailers or the prices at which the articles were openly and actively offered for sale in good faith for a reasonably substantial period of time in the recent, regular course of business.

[33 FR 11986, Aug. 23, 1968]

§ 15.278 Commission approves proposed franchise agreement for chain of pizza and sandwich restaurant-carryout shops.

The Commission issued an advisory opinion approving a proposed franchise agreement between a trademark-trade name owner and individual operators of pizza and sandwich restaurant-carryout shops. Some of the important provisions of the agreement are the following:

(a) Either the licensee or the licensor may submit to arbitration any questions concerning agreement termination rights and obligations, including return to the license of all or any portion of the initial fee.

(b) Licensor must make available for sale to licensee the foods, paper products and supplies necessary for conducting the business but licensee is not required to purchase them from licensor.

(c) Licensor will prepare and place advertising directed to ultimate consumers in the general area of licensee's shop; license will provide the funds for such advertising; licensor will give licensee a quarterly accounting of the use of such funds.

(d) Licensor may direct information other than price to go into signs and advertising.

(e) The food sold and service provided must meet standards of quality set by licensor.

(f) Licensee is not to operate a similar business for 2 years after termination of the agreement within 2 miles of his former shop.

[33 FR 11987, Aug. 23, 1968]

§ 15.279 Commission advises agricultural cooperatives it has no objection to proposed purchase of country elevators of financially-troubled direct competitor.

(a) The Commission issued an advisory opinion to agricultural cooperative applicants who wish to acquire several country elevators of a financially-troubled direct competitor.

(b) The applicants are a statewide federated agricultural association and affiliated local farmer cooperatives. Applicants, and the company with the operating plants sought to be acquired, purchase farm products from growers and resell the partially processed products to further processors, canners and other intermediate distributors. The State organization offers to help the financially-troubled company by furnishing technical assistance on a contract basis in the farm supply and commodity marketing area to help the company in continuing to be an important factor in a particular industry. Individual market shares of the cooperatives are reported to be small.

(c) The Commission advised the applicants it has no objection to the proposed acquisition of some of the assets of the financially-troubled competitor.

[33 FR 12088, Aug. 27, 1968]

§ 15.280 Commission advised applicant it cannot approve a proposed partial acquisition of a direct competitor's business that may substantially increase applicant's market power.

(a) The Commission issued an advisory opinion to an applicant who sought premerger clearance to acquire a number of operating plants of a direct competitor.

(b) According to the information submitted by the applicant, both companies purchase an agricultural product from growers and resell the partially processed product to further processors and canners. Both companies appear to be among the top four firms in the market and to have substantial shares of the market.

(c) The Commission expressed the opinion that it cannot approve the proposed acquisition because such an acquisition may substantially increase applicant's market power and thereby tend to produce anticompetitive effects in violation of the Clayton Act, as amended.

[33 FR 12088, Aug. 27, 1968]

§ 15.281 Trade association recommendations with respect to sales periods and services furnished by members and cash discounts by suppliers.

(a) The Commission rendered an advisory opinion to a trade association of clothing retailers that its proposal to hold discussions, conduct studies and make recommendations to its members and their suppliers with respect to three problems which confront the industry would probably be illegal.

(b) The association advised that competitive conditions have forced the retailers into longer and longer sales periods which squeeze profit margins in the stores and contribute to improper merchandise assortments for one-third of the year. Second, it was stated that the cost of alterations was creeping upward as labor costs increase, thus adding to overhead expense and that only a limited number of stores charge for these alterations. Third, the association advised that manufacturers vary in the amounts of cash discounts they will give and in the time periods during which they will be allowed, thus confusing retailers and resulting in substantial clerical errors. The association felt that it would greatly simplify retailer record keeping if a uniform date of payment and uniform discount terms became an accepted practice in the industry.

(c) In an effort to find solutions to these problems, the association contemplated three steps concerning which an opinion was desired. First, it asked if it could include articles in its bulletins about the benefits of starting clearance sales at later dates and otherwise publishing information designed to show that stores better serve customers when they operate as a one price store for the maximum amount of time during the year. Second, it inquired as to whether it could include cost information on alterations showing the inequities of not applying reasonable charges for alterations and as to whether local merchants could discuss, without specifics as to price, the merit of charging for alterations and urge local cooperation. Third, the association inquired as to whether it could include in its publications information on the desirability of uniform cash discounts, pass resolutions and urge manufacturers to cooperate.

(d) The opinion advised that all three of these proposed courses of action would, in the Commission's view, be of questionable propriety under existing law. With respect to the passage of resolutions urging manufacturers to adopt uniform cash discount terms, it was the Commission's opinion that, even if unaccompanied by any intent to force the manufacturers to adopt the policies set forth therein, there was implicit in such resolutions by the retailers too grave a danger that they would serve as a device whereby the concerted power of the members of the association was brought to bear to coerce the manufacturers to conform their discount policies to the restrictive standards of the resolutions, or, at the very least, as an invitation to enter into agreements among themselves to do so.

(e) The other two proposals seemed to the Commission to involve activities by the association which would lead to suppression of competition among the members. In the Commission's view, the time and duration of sales and the furnishing of alterations without additional charge are methods of competition among the retailers. The natural and probable result of what the association proposed to do would be to limit competition in these areas and thus would constitute an unlawful restraint of trade. While the steps which the association contemplated may not be the equivalent of an agreement among the members to follow the recommended procedures, still if they had the effect of persuading substantial numbers of those members to do so, it would raise a serious inference of such an agreement and hence would be of questionable propriety under the antitrust laws. Therefore, any actions by the association which would have a tendency to bring about that result could not, the Commission stated, meet with its approval.

[33 FR 12088, Aug. 27, 1968]

§ 15.282 Marking requirements for shirts assembled in the United States from foreign components.

(a) The Commission advised an apparel manufacturer that the Textile Fiber Products Identification Act would require an affirmative disclosure of the particulars of foreign origin under the following facts:

(b) The manufacturer proposed to contract with or establish a plant in Hong Kong where foreign-made shirt cloth would be cut into parts and simple sewing would be done. The parts would then be shipped to a plant in the United States where, through a process of assembling, sewing, and finishing of the cut parts, individual shirts would be manufactured. From the cost data furnished it appeared that 60 percent of the cost of labor would be performed in this country and 40 percent in Hong Kong. The material and labor furnished in Hong

Kong would account for 61.5 percent of the total cost of finished shirts and the labor performed in the United States would account for 38.5 percent of the total.

(c) The Commission advised that it was of the opinion that, under the laws it administers, textile products produced and processed in this manner must be labeled as "Assembled and sewn in the United States of materials imported from Hong Kong."

[33 FR 12089, Aug. 27, 1968]

§ 15.283 Foreign origin—container disclosure for contents of multiple foreign origin.

(a) The Commission advised a requesting party regarding information as to origin which should be set forth on a kit containing three domestic and eight foreign components from four different foreign countries.

(b) Although the individual components are separately marked as to origin, this information is not readily available to a prospective purchaser at the time of purchase.

(c) The Commission stated that a clear and conspicuous disclosure should be made on the container in the following terms, or in substantially equivalent terms:

"Some of the enclosed items are made in [countries] W, X, Y, and Z."

[33 FR 12306, Aug. 31, 1968]

§ 15.284 Location of foreign origin disclosure.

(a) In response to a request for an advisory opinion, the Commission announced it would be necessary to disclose the foreign country of origin of imported stainless steel flatware on the outer portion of the cover of the container.

(b) Under the facts presented to it, the flatware will be properly marked as to its foreign country of origin on the underside of the handle when it is imported. Because of the manner in which the flatware will be repackaged in the United States, the foreign origin marking will not be seen by prospective purchasers through the cover of the container. Moreover, each container will be sealed with a plastic film wrapper thus making it virtually impossible to inspect the merchandise prior to the purchase thereof.

(c) The specific question ruled upon by the Commission was whether it would be necessary to disclose the foreign origin on the outer portion of the container, in view of the fact that the disclosure on the flatware cannot be seen prior to the purchase of the merchandise.

(d) In ruling that a meaningful disclosure would be required, the Commission said: "Whenever an affirmative disclosure of the foreign country of origin is required in order to prevent deception, the general rule is that the marking must be clear and conspicuous. This means that the disclosure must be placed in a location at the point of sale where it would be readily observed by prospective purchasers making a casual inspection of the merchandise prior to, not after, the purchase thereof. Under the facts described in your letter, the container normally would not be opened until after the purchase has been consummated. Since the disclosure of origin on the underside of the flatware cannot be seen through the cover of the container, the Commission is of the opinion that the disclosure will have to be made on the outer portion of the cover of the container in order to inform prospective purchasers of a material fact bearing upon their selection.

[33 FR 12306, Aug. 31, 1968]

§ 15.285 Formation of common marketing association by agricultural cooperatives.

(a) The Commission rendered an advisory opinion to the effect that it could see no objection to the formation by three agricultural cooperatives of a nonprofit marketing association.

(b) While the marketing association was to be formed by the three cooperatives under State law, it was contemplated that any other producer of the same products could become a member. At the time, there were several other corporations which were not marketing cooperatives but which were engaged in the production of the same products.

(c) It was stated that the association would have no capital stock, would be a nonprofit cooperative organized for the mutual benefit of its members, membership would be restricted to producers who patronize the association, voting rights were to be equal and no member was to have more than one vote. Property rights were to be unequal and in proportion to the patronage of each member to the total patronage of all members with the association. It was further provided that the association would not market the products of nonmembers

(d) The proposed contract with the producers provided that the association would be the exclusive sales agent of the producers for the purpose of marketing their products. The Association could, under the contract, market or direct the marketing of all products produced by the producers in such manner and under such prices as it deems best. The association could designate authorized handlers to market the products of the members and the producers must market through these handlers. The producers themselves could execute a Handler's Contract and become authorized handlers.

(e) The Handler's Contract between the association and all authorized handlers provided that the handler was to act as the hired sales agent for the association and was to be governed by the rules, regulations, orders and prices issued by the association. The handler agreed therein not to sell for less than the prices recommended by the association. The handlers could, under the contract, market other products for the producers and could handle products for nonmembers.

(f) The opinion pointed out that the purpose of the Capper-Volstead Act (7 U.S.C. 291, 292) is to permit persons engaged in agricultural pursuits to associate in the collective marketing of their products. Under its provisions cooperative associations may make contracts or agreements as will effect such purpose and may have marketing agents in common. It has been construed as a grant of immunity from the antitrust laws insofar as collaboration among members of the cooperative associations are concerned. This immunity ends, however, at the point where they act, either by themselves or with other persons or entities not in this category, to restrain trade or otherwise eliminate competition at successive stages in the marketing process.

(g) The opinion further advised that the Commission had considered the proposal and was of the opinion that formation of the proposed marketing association by the three cooperatives would not result in violation of Commission administered statutes if implemented in the manner outlined. The Commission cautioned, however, that the opinion was limited to the formation of the proposed marketing association and was not to be construed as approval for any practice which may be predatory in nature, may result in unlawful monopolization, may restrain commerce to the extent that prices are unduly enhanced thereby, nor to conspiracies or combinations between the association and persons or entities not in this category.

[33 FR 12307, Aug. 31, 1968]

§ 15.286 Foreign origin—labeling requirements for tennis shoes made in Virgin Islands with foreign component.

(a) The Commission advised a requesting party that no disclosure need be made as to the presence of foreign made uppers used in the manufacture of tennis shoes in the Virgin Islands.

(b) The uppers account for less than 30 percent of the total product value of the shoes and the other components are of domestic origin.

[33 FR 12307, Aug. 31, 1968]

§ 15.287 Publication of advertising standards by private association.

(a) The Commission announced its approval of advertising standards proposed for publication by a private association.

(b) The association has come to believe that a particular commodity is, in some instances, being locally advertised to the deception of consumers and the unfair disadvantage of competitors.

(c) It therefore devised a statement setting forth a number of practices which have heretofore been found unlawful by the Commission and proposes to invite industry members voluntarily to agree to avoid such practices. It intends also to make its statement available to advertising media with a request that the media voluntarily use the standards set forth in the statement to screen proposed copy for acceptance.

(d) The Commission stated that: "As long as each signer of the document agrees to, and abides by, its provisions without coercion, expressed or implied, and as long as each advertising medium exercises its own independent judgment, without coercion expressed or implied as to what copy it will accept or reject, the Commission would have no objection to your proposed document as written, or its proposed use."

[33 FR 12646, Sept. 6, 1968]

§ 15.288 Receipt of promotional allowances prohibited by order.

(a) The Commission was requested to render an advisory opinion with respect to the legality of a respondent's proposed participation in a special promotion sponsored by one of its suppliers. The respondent, a retailer, is under an outstanding Commission order which prohibits it from inducing and receiving promotional allowances when it knows or should know that the allowances are not made available on proportionally equal terms by the supplier to all its other customers in competition with the respondent.

(b) According to information provided by the respondent, the supplier essentially has offered to pay 50 percent of the respondent's advertising space and/or time costs up to a maximum participation of $5,000. Further, the Commission understands that the supplier has at least two other retailer customers in the respondent's trading area, and that the supplier has represented to respondent that it will at some undisclosed future time offer the special promotion to each.

(c) On the basis of this information, the Commission advised that whether respondent's proposed participation in the subject promotion will be in compliance with the order to cease and desist depends in large part upon the general availability of the said promotion, a threshold determination which must be made by the respondent.

(d) The Commission advised that if the subject promotion is available to the other known customers of the supplier who compete with the respondent, no problem would seem to be presented by respondent's participation in the promotion. On the other hand, if respondent knows or, as a reasonable and prudent businessman, should know that the promotion is not available to such other known customers at such time as respondent would participate in the promotion (and the information before the Commission strongly suggests that this is the case), respondent's participation in the promotion would be in violation of the order.

(e) Accordingly, the respondent was directed to inform the Commission of any determination it makes to participate in this promotion.

[33 FR 12646, Sept. 6, 1968]

§ 15.289 Compost peat.

(a) The Commission rendered an opinion to a company which sought permission to use the term "compost peat" as descriptive of organic, decomposed municipal refuse.

(b) Ruling that it had no objection to use of the word "compost" since the end product is the result of decomposed organic matter, nevertheless the Commission reached a different conclusion with respect to the use of the word "peat."

(c) In rejecting use of the word "peat" to describe the end product in question, the opinion stated: "The Commission believes that the purchasing public would generally understand 'peat' to be a natural product, that is, one that is formed naturally where vegetable matter has decomposed over a long period of time under particular conditions. Peat moss is a common form of such natural product. The organic material produced in your decomposition process would not be 'peat' as that term is so generally understood, and the Commission believes that to describe it as 'peat' would be misleading. Accordingly, you are advised that the Commission would find your proposed use of the term objectionable."

(d) Under the facts presented to it, the requesting party proposes to contract with various cities to handle their municipal refuse. All nonorganic material will be removed from such refuse and sold to various users thereof. The remaining organic material consisting of vegetable matter emanating from food and garden sources, grasses, leaves, trees, wood cellulose and other plants will then be processed under very high moisture conditions during the decomposition stage. Thereafter, the material will be held in large pits for seven days and then removed to storage sites for further decomposition.

[33 FR 12646, Sept. 6, 1968]

§ 15.290 Membership in trade association by manufacturer under Commission order.

(a) The Commission rendered an advisory opinion to a beverage manufacturer, currently subject to a cease and desist order, covering the legality of a proposed reorganization of an industry association to which the manufacturer belongs.

(b) Specifically the Commission was asked whether the manufacturer could properly sign the proposed articles of incorporation covering a state trade association, which is presently unincorporated and of which that manufacturer is now a member, where that manufacturer is covered by a Commission order prohibiting it from engaging in price fixing or engaging in any conversations with competitors regarding prices or terms of sale. The association's members are manufacturers and distributors of a product produced by the inquiring manufacturer. The proposed articles of incorporation state the purpose of the association to be to promote, represent and develop the industry within the state. In light of the foregoing circumstances, the Commission stated that it had no objection to the signing of the proposed articles of incorporation by the inquiring manufacturer.

[33 FR 12647, Sept. 6, 1968]

§ 15.291 Commission refuses to grant blanket approval to small baking company to be acquired by anyone including corporations subject to Commission acquisition-prohibition orders.

(a) The Commission rendered an advisory opinion in response to a premerger clearance request from the owner of a small baking company who wants to sell the business to anyone including corporations subject to Commission cease and desist orders containing provisions prohibiting further acquisitions without prior Commission approval.

(b) The applicant was advised by the Commission that it cannot grant the blanket approval requested. The Commission pointed out that corporations covered by Commission acquisition-prohibition orders are free, of course, to apply for prior approval to acquire the applicant's company in compliance with the order against the particular corporation.

(c) From the data submitted by the applicant, it appears that, while the population has declined in its trading area and its sales have produced reduced revenues, the company has continued to operate profitably. No evidence was presented of any attempts to sell the business to any other independent baker or to anyone presently outside the baking industry.

[33 FR 14637, Oct. 1, 1968]

§ 15.292 Paua shell being described as "marine opal".

(a) The Commission rendered an advisory opinion in which it concluded that costume jewelry containing a centerpiece consisting of a small inset of paua shell could not be described as "marine opal".

(b) According to the Commission's opinion:

> "* * * opal is a gem which is well known generally among the purchasing public and the trade and has certain well-established characteristics and properties. It is an inorganic mineral found in Australia which is far more expensive and preferable than the paua shell, which is an organic substance found in the ocean. Under these circumstances, therefore, the Commission has concluded that it would be deceptive to label a paua shell as "opal" on the well-established

principle that the consumer is prejudiced if, upon giving an order for one thing, he is supplied with something else."

(c) Commenting upon the inadequacy of the word "marine" to remove the deceptive nature of the word "opal," the Commission said that the word "marine" would only serve to enhance that deception. It reached this conclusion because the word "marine" would convey the impression, contrary to fact, that this is a variety of opal found in the ocean, when in fact, just the reverse is true, i.e., opal is an inorganic mineral found in the ground.

[33 FR 14637, Oct. 1, 1968]

§ 15.293 Commission declines ruling on use of term "humus", and states Peat Industry Trade Practice Rules apply if material comes within certain definitions.

(a) The Commission responded to a request for an advisory opinion: (1) Concerning the use of the term "humus" in proposed marketing of certain topsoil material, and (2) whether there is anything in the proposed operation which is subject to Commission rules or regulations.

(b) The application was made by a company which wants to market certain soil material as humus. The company submitted a partial analysis of the material as follows:

	Top 1 foot	3-4 feet	7-8 feet
Marked			
Water holding capacity	950 percent of its dry weight	906 percent of its dry weight	916 percent of its dry weight
pH	6.85	6.90	6.89
Moisture	82.2 percent	87.5 percent	83.8 percent
Ash (dry basis)	6.8 percent	12.4 percent	9.0 percent
Organic content (dry basis)	93.2 percent	87.6 percent	91.0 percent

The Commission noted that the analysis presented above does not indicate the amount or degree of decomposition of organic matter that may have taken place, nor the mineral content of the soil.

(c) The Commission invited attention to this definition of humus in *Soil: The Yearbook of Agriculture (1957)*, prepared by the U.S. Department of Agriculture and published by the U.S. Government Printing Office (at page 759): "Humus—The well-decomposed, more or less stable part of the organic matter in mineral soils."

(d) The Commission declined to express an opinion on the marketing of the material as humus because an informed decision on the proposed course of action or its effects could be made only after extensive investigation or testing; requests for opinions in this category are ordinarily considered inappropriate for Commission advice under § 1.1(c) of the Commission's procedures and rules of practice. Applicant also asked whether there is anything in the proposed operation which comes under Commission rules or regulations.

(e) Applicant was advised that the Commission's Trade Practice Rules for the Peat Industry, as promulgated January 13, 1950 (16 CFR Part 185), apply to proposed operations if the material to be sold comes within the following definitions under such rules: As used in these rules, the terms "industry product" and "peat" shall be understood as having the following meanings:

Industry Product. Any product marketed for use as a soil conditioner, or for any agricultural or horticultural purpose, which is composed, or is represented as being composed, wholly or in part of peat; also, any product marketed for any such purpose which is composed, or is represented as being composed, wholly or in part of a humus or muck derived from peat.

Peat. Any partly decomposed vegetable matter which is accumulated under water or in a water-saturated environment through decomposition of mosses, sedges, reeds, tule, trees, or other plants.

(f) The Commission invited attention to the note appended to Rule 3, calling for the voluntary nondeceptive disclosure of the degree of decomposition and principal uses of the product, as well as the acid and ash content, and moisture holding capacity. If this practice is observed, the likelihood of deception should be much reduced, the Commission commented.

(g) With regard to the second question, the Commission again invoked § 1.1(c) of its procedures and rules of practice. An informed decision by the Commission on the presence of any peat, or of any humus or muck derived from peat, could not be made without extensive investigation or testing. Normal advisory opinion procedures do not provide for such testing or investigation.

[33 FR 14637, Oct. 1, 1968]

§ 15.294 Advertising on food product wrapper.

(a) The Commission advised a food product manufacturer that it would not object to advertising proposed to be placed on the wrapper for the food product.

(b) The advertising would offer to those who respond a money making opportunity in the form of premiums or payments for the sale of a specified product. An inquirer would incur no obligation upon receipt of the plan, or thereafter, and would be free to accept or reject it at will. Anyone performing under the offer would be recompensed according to a clearly disclosed scale for services rendered. No monetary investment would be required.

[33 FR 15020, Oct. 8, 1968]

§ 15.295 Domestic origin marking on product containing foreign made components.

(a) The Commission responded to a request for an advisory opinion in regard to the following two questions:

(1) What percentage of imported components may be used in the finished product (bearings) without the necessity of disclosing the foreign country of origin thereof?

(2) Would it be proper to stamp the two types of bearings, which are partly made in a foreign country, as "Made in USA"?

(b) Because the party seeking the opinion did not know the cost of the imported components in relation to the total cost of the finished product, the Commission said that the first question appeared to be somewhat hypothetical in that it does not involve a specific proposed course of action. Under these circumstances, the Commission concluded that the question was not the proper subject of an advisory opinion.

(c) With respect to the second question, the Commission concluded as follows: "* * * the 'Made in USA' mark would constitute an affirmative representation that the bearings are made in their entirety in the United States. If the bearings did in fact contain foreign made components of a substantial nature, it would be improper to mark the finished product as 'Made in USA' without a clear and conspicuous disclosure indicating the foreign country of origin of the imported components."

[33 FR 15020, Oct. 8, 1968]

§ 15.296 "Failing company" theory applied in Commission approval of sale of assets to a competitor.

(a) The Commission issued an advisory opinion granting premerger clearance for a company in imminent danger of dissolution to sell all or part of its assets to a direct competitor.

(b) The selling company's financial affairs were in such state that it obviously would have ceased to be a competitive factor in its market in a matter of days. This being so, the Commission approved a sale to the only purchaser willing to, or in a position to, immediately salvage the assets.

[33 FR 15021, Oct. 8, 1968]

§ 15.297 Premerger clearance—"Failing company"—portion of fixed assets to be sold to keep company in business.

The Commission advised an applicant that it has no present intention to take any action if the proposed sale of certain fixed assets to a direct competitor should be made, in view of the information submitted that:

(a) The (applicant) company is in critical financial condition and failing;

(b) Efforts to find other purchasers have been unsuccessful, except that one other purchaser was found who wished to buy a smaller amount of the assets than originally stated but who is not now in any position to buy any of the properties;

(c) The proposed sale is expected to generate sufficient funds to meet outstanding debts and provide necessary working capital to continue the company as a going concern and an active competitor.

[33 FR 15021, Oct. 8, 1968]

§ 15.298 Disclosure of origin of imported lenses finished domestically.

(a) The Commission rendered an advisory opinion as to whether certain glass filter lenses used on welding helmet could be described as "Made in U.S.A."

(b) Under the facts presented to the Commission, the glass out of which the lenses are made is imported and upon arrival in the United States it is subject to further processing, such as cutting into special sizes, grinding of the edges, cleaning, polishing, and labeling as to different shades of intensity and packaging.

(c) In denying use of the "Made in U.S.A." mark on such a product, the Commission said: "* * * a 'Made in U.S.A.' mark on the finished product would constitute an affirmative representation that the lenses are made in their entirety in the United States. Since the lenses are composed of imported glass, it would be improper to mark the finished product as 'Made in U.S.A.' without a clear and conspicuous disclosure indicating the foreign country of origin of the imported glass."

[33 FR 15021, Oct. 8, 1968]

§ 15.299 Disclosure of country of origin of repackaged goods imported in bulk.

The Commission advised a requesting party that a product imported in bulk into the United States and thereafter broken and wrapped into a number of smaller packages and offered for sale to the general public should be clearly and conspicuously marked as to country of origin in such way as to be readily observable to a prospective purchaser on casual inspection.

(38 Stat. 717, as amended; 15 U.S.C. 41-58)

[35 FR 15199, Oct. 11, 1968]

§ 15.300 Contest and its advertising by retailer deemed objectionable.

(a) The Commission was requested to furnish an advisory opinion concerning a proposed contest and advertising pertaining to it.

(b) The Commission observed that the proposed advertising is deceptive. Statements of the nature and value of the prizes are misleading. The proposed advertisement discloses little of the nature of the contest in which readers are invited to participate. The contest might expire at any moment.

(c) On the basis of the facts as presented, the Commission concluded that the proposed advertising, if circulated, would be in violation of section 5 of the Federal Trade Commission Act.

(d) The Commission noted that the proposed contest is so intertwined with the proposed advertising that the plan as a whole, if implemented, would be in violation of law.

[33 FR 15200, Oct. 11, 1968]

§ 15.301 "Danish" as applied to furniture.

In amplification of Rule 7—Deception as to Origin—set forth in its Trade Practice Rules for the Household Furniture Industry, the Commission advised the requesting party as follows:

(a) "Danish," "Danish Modern," and like terms should be used only as to furniture produced entirely within the Kingdom of Denmark;

(b) "Danish designed" and like terms should be used only as to furniture entirely designed or styled within the Kingdom of Denmark;

(c) "Danish style," "in the Danish manner," "after the Danish style," and like terms may be used to describe furniture manufactured other than in the Kingdom of Denmark provided such furniture has the characteristics of Danish design as understood by the general public.

[33 FR 15588, Oct. 22, 1968]

§ 15.302 Promotional plan involving "cents off" coupons and demonstrators.

(a) The Commission rendered an advisory opinion to the promoter of a promotional plan involving the use of "cents off" coupons which are to be given out by girl demonstrators in connection with the sale of items sold only in grocery stores.

(b) Offered to all competing retailers in a selected trading area, irrespective of whether they buy directly or through wholesalers, the coupons will be valid only for the week that the promotion is in effect. Supplying as many demonstrators and coupons as may be necessary to meet the demand therefor, larger stores will have as many as three gift demonstrators giving out coupons in attendance for 3 days and smaller stores will have one or two girls in attendance for 1 or 2 days. Participating manufacturers will pay the promoter a certain sum per each demonstrator, plus the amount of the value of the redeemed coupons. Participating retailers will receive nothing of value other than demonstrator services, except reimbursement for the exact value of the coupons which they have redeemed. In addition to being given out by the demonstrators the "cents off" coupons will also be attached to the shelf in front of the product that is being promoted.

(c) For those stores which find the basic plan is not suitable or usable in a practical business sense, the promoter will furnish without charge an alternate plan consisting of a prominent bulletin board announcing the plan to consumers. Placed in the most advantageous position in the store by the owner, the bulletin board will also have an adequate supply of "cents off" coupons attached thereto. In addition, coupons will also be attached to the shelf in front of each product being promoted, as in the case of the basic plan involving the use of demonstrators. If the retailer does not wish to use the bulletin board, he will be permitted to hand out the coupons as the customer passes by the cash register.

(d) Notice of the availability of the basic and alternate plans will be made by (1) letter every 6 months to all wholesalers requesting them to notify their retail customers, (2) working with various trade associations on a continuous basis so that the associations will inform their members, (3) publishing ads every 3 months in two newspapers widely circulated among the trade, (4) letters sent to the buying offices of cooperatives and chain stores, and (5) use of the following statement printed on the back of each coupon: "For detailed information about this coupon call (promoter's name and telephone number)".

(e) In the opinion, the Commission stated that the proposed promotional plan would not be in conformity with the law for the following two reasons:

(1) "First, section 2(e) of the amended Clayton Act requires that promotional services be furnished to all competing purchasers on proportionally equal terms, if a promotional service is furnished to one purchaser. If the length of time for which the service is being furnished varies as between competing customers, the end result will be that some customers will be furnished services in a greater proportion than others. In essence, the law requires that the services which are being furnished must be offered for a specified period of time which is uniformly applicable to all competing customers. Under your proposed plan, some stores may be furnished the services of demonstrators for up to 3 days, whereas some competing stores will be supplied with such services for only 1 or 2 days. Because of this disparity in the amount of time during which demonstrator services will be furnished, the Commission believes that the plan does not comply with the required

statutory proportionally equal treatment.

(2) "The second defect in the proposed plan relates to the following statement which appears on the face of 'cents off' coupon: 'Good Today Only—During Demonstration.' According to the terms of the proposed plan, each coupon will be valid for 1 week. Therefore, the aforementioned statement which appears on the face of the coupon is misleading because it misrepresents the period of time during which one may take advantage of the alleged savings."

(f) The opinion then pointed out that if the promoter decided to correct the two above-mentioned deficiencies, the Commission would withdraw its objection to the plan, provided the following two conditions are met.

(1) "First, as the promoter of this plan, you must make it clear to each supplier and each retailer that even though an intermediary is employed, it remains the supplier's responsibility to take all reasonable steps so that each of the supplier's customers who compete with one another in reselling his products is offered either an opportunity to participate in the promotional assistance plan on proportionally equal terms or a suitable alternative if the customer is unable as a practical matter to participate in the plan; if not, the supplier, the retailer and the promoter participating in the plan may be acting in violation of section 2(d) or (e) of the Clayton Act and/or section 5 of the Federal Trade Commission Act.

(2) "Second, with respect to this matter of notification, you have outlined five methods which you expect to utilize. The Commission is withholding judgment as to the adequacy of the fifth method, namely, the use of a statement printed on the back of each coupon. It is doing so because it does not know how the retailer will get possession of this coupon and it believes that the statement itself is not sufficiently informative to apprise prospective retailers about the plan. But regardless of whether the stated methods of notification or others are used, the ultimate test is whether the plan has been effectively communicated to all competing customers at or about the same time within the selected marketing area and to those who, geographically, are located on the periphery of that area and in fact compete with the favored retailers."

[33 FR 15588, Oct. 22, 1968]

§ 15.303 Commission does not object to program employing data processing equipment to collect and disseminate actual production and sales information.

(a) The Commission issued an advisory opinion telling an applicant it does not object to a proposed program to employ data processing equipment for the collection and dissemination of actual production and sales information rapidly.

(b) The program is to be made available to poultry processors. Individual identity of participants will not be revealed to others except in long-and-short emergencies. It is understood that such a situation exists when a processor finds he has an insufficient supply of chickens (i.e., he is "short") to fill the contractual obligation under a sales contract he has made; another supplier may have a surplus (i.e., he is "long"); the proposed program, in these emergencies, would permit the short and long suppliers to communicate with each other through the data processing equipment. Only in such a situation would any participants learn each other's identity.

(c) The proposal involves the collection and reporting of actual production and sales data rapidly; it will not deal with predictions by participants nor with asking, suggested or "future" prices.

(d) The service is to be made available solely to poultry processors on a daily basis; poultry distributors, applicant says, are not interested in participating. Other subscribers may receive weekly or monthly information summaries but not daily reports.

(e) The Commission advised that it would have no objection to the proposal if implemented in the manner outlined in applicant's letter, but that this opinion is conditioned upon the submission within nine months, of a full report indicating the manner in which the plan has worked in actual practice.

[33 FR 15589, Oct. 22, 1968]

§ 15.304 [Reserved]

§ 15.305 Sales below cost provision in ethical advertising guide.

(a) In Advisory Opinion Digest No. 249 (§ 15.249), the Commission announced that a trade association's proposed "Guide to Ethical Advertising Practices" was unobjectionable save for its unqualified condemnation of advertising sales below cost.

(b) The following revised sales below cost provision was subsequently found unobjectionable: "Members will not use below cost advertising as bait advertising. However, either merchandise or services or a combination of both may be offered below a member's total cost for limited periods of time in close-out sales, stock reduction sales, promoting offers, provided such offers are truthfully and nondeceptively made and the member fully performs according to his offer."

[33 FR 16496, Nov. 13, 1968]

§ 15.306 Commission does not object to computerized inventory control system to be furnished suppliers by third-party promoter subject to certain safeguards for nonparticipating retailers.

(a) The Commission issued an advisory opinion concerning a computerized inventory control system to be furnished suppliers by a third-party promoter.

(b) The promoter proposes to computerize sales data and project product inventory requirements for subscribing suppliers pursuant to information periodicals obtained from participating retailers.

(c) The Commission advised the applicant (the promoter) that, on the basis of the information submitted, the Commission does not object to the proposal subject to two safeguards for nonparticipating dealers: First, that the promoter satisfy the Commission that its subscribing suppliers "will continue to provide personal salesman service or some noncomputerized equivalent to those dealers who do not participate," and second, that suppliers "make the results of the computer analyses of sales trends and other general market information available to nonparticipants if and as they desire it."

[33 FR 17233, Nov. 21, 1968]

§ 15.307 Foreign origin of cloth made into tablecloths in U.S.A.—permissible labeling—proposed trade name and trademark; Commission warnings.

(a) The Commission issued an advisory opinion concerning permissible labeling of tablecloths converted, dyed and finished in the United States from cloth imported in the greige from Japan, and to be sold in interstate commerce.

(b) Submitted for Commission consideration was a label containing a proposed trade name and trademark. The trade name is a newly coined word composed of the term for the nationality of a particular European country, with a suffix. The trademark looks like a European heraldic design.

(c) The Commission advised the applicant that, in its opinion, use in commerce of the proposed trade name and trademark for the tablecloths in question would probably amount to a deceptive act or practice in violation of section 5 of the Federal Trade Commission Act. The deception appears to be so pronounced, the Commission added, that it cannot be abated by qualifying words, "Made in U.S.A. of cloth imported from Japan".

(d) Further, in the opinion of the Commission, Rule 34(b), § 303.34(b) of this chapter, under the Textile Fiber Products Identification Act, applies because the form of the cloth is basically changed and therefore the country of origin (Japan) need not be disclosed.

[33 FR 17233, Nov. 21, 1968]

§ 15.308 Commission does not object to proposed acquisition by dairy products producer-processor-distributor of another processor-distributor.

(a) The Commission issued an advisory opinion telling an applicant it does not object to a proposed merger on the basis of the information available at this time.

(b) The applicant (Company A) is a dairy farmer cooperative association whose members own cows producing raw milk; applicant operates processing plants in one State and sells dairy products principally to independent home deliverymen in two States. The company (Company B) to be acquired operates a processing plant in one State and sells dairy products to independent home deliverymen, grocery stores and institutions in two States. The processing plants of the two companies are not in the same State. Members of Company A presently supply about 50 percent of the raw milk needs of Company B and it is not anticipated that non-Company A members will be foreclosed as a result of the proposed merger.

(c) Company A and Company B contend that the proposed combination will result in a stronger regional business entity to compete more effectively with integrated chain stores (having their own dairy facilities) and large national dairy companies in selling dairy products to consumers.

[33 FR 17234, Nov. 21, 1968]

§ 15.309 Inclusion of provision in cooperative advertising agreements limiting price advertising by retailers.

(a) The Commission rendered an advisory opinion regarding a proposal to include the following statement in cooperative advertising agreements to be drafted by the requesting party for use by manufacturer-clients for the purpose of placing a restriction on price advertising practices by their retailer-customers: "Dealer advertising will not qualify for cooperative reimbursement if it is featured at a price below the retailer's wholesale price (loss leader type) since such advertising tends to lower the quality image of the product in the consumer's mind."

(b) The requesting party explained that this provision is intended to assist manufacturer-clients to protect the quality of their brand image through providing them with the means for limiting the payment of promotional allowances to those retailer-customer advertisements which mention price at or above the retailer's wholesale price level. He took the position that such limitation would not affect any retailer's markup picture.

(c) The Commission advised that the question posed does not readily lend itself to a categorical answer which, necessarily, would be affected by the facts surrounding any manufacturer-client's use of the restriction. Considering the various possibilities which may arise, the Commission is of the opinion, however, that it cannot give its approval to the use of such provision in any advertising allowance program which may be used on a continuing, year-round basis. In such programs a manufacturer customarily offers to pay, on proportional terms, a fixed percentage of his customer's advertising costs at any time during the year. To incorporate such a restriction in that kind of promotional program would, in the Commission's view, have a tendency to fix or establish a permanent floor under resale prices which would be of questionable legality under the antitrust laws.

(d) The Commission further pointed out that it does not see the same objection to the use of such provision in situations where the promotional offer is made on an infrequent or intermittent basis during the year. In such instances the offer is usually made for a special purpose, such as to stimulate off-season sales or at times during the year to fit in with an overall marketing program. In these situations, the Commission advised, it does not foresee the same restrictive effects on resale prices when a manufacturer, who is otherwise complying with the law, provides that he will not pay any part of the cost of advertising featuring a price below the retailer's wholesale cost.

(e) It is, of course, assumed that the promotional advertising allowance offer will be made to all retailers irrespective of the prices that they have been charging at other times.

[33 FR 17626, Nov. 26, 1968]

§ 15.310 Disclosure of country of origin of imported watch bands.

(a) The Commission was requested to furnish an advisory opinion as to the necessity for the disclosure of the country of origin of a watch band or watchcase which was attached to a watch in a foreign country prior to importation into the United States.

(b) The Commission advised that in its view the fact that the watchcases are imported need not be disclosed and that the country of origin of a watchcase with a watch band permanently affixed thereto need not be disclosed, but that the country of origin of a metallic watch band of the detachable type must be disclosed.

[33 FR 17626, Nov 26, 1968]

§ 15.311 Origin disclosure of imported upper material used in shoes.

(a) The Commission rendered an advisory opinion to the supplier of certain synthetic fabric which is to be used in footwear as an upper material. The opinion dealt with various questions relating to the necessity to disclose the origin of the fabric, which is made wholly or in part in a foreign country.

(b) Sold directly to shoe manufacturers, the material will be used in the manufacture of dress and casual shoes, including playtime or tennis shoes, but not work shoes or work boots. Under one method of production, the yarn would be extruded domestically but would be woven, dyed, and backed in a foreign country. Such upper material made abroad would represent approximately 25 percent of total material costs for women's shoes and approximately 23 percent for men's shoes. Under the second contemplated method of production, the fabric will be made abroad in its entirety. Where the upper material is completely of foreign origin, it will represent approximately 35 to 40 percent of total material costs for a pair of women's shoes and approximately 40 percent of total material costs for men's shoes.

(c) In responding to the request for an advisory opinion, the Commission made the following general observations:

(1) "* * * First, the Commission construes any affirmative representation that products are made in the U.S.A., as constituting an affirmative representation that the products are made in their entirety in this country unless there is a clear and conspicuous disclosure of the origin of the imported part or parts.

(2) "Further, in the absence of any affirmative misrepresentation as to origin, the Commission is of the opinion that, under the facts as presented, it will not be necessary to disclose the country of origin of the imported upper material.

(3) "Lastly, you have inquired as to whether disclosure would be required if the shoes are manufactured by a well-known American concern or bear a well-known American trademark. The answer to this question would depend upon whether, as a practical matter, the use of such name or trademark constitutes a representation of domestic origin. The Commission believes that each such case must be judged on its own merits in view of the surrounding facts and circumstances, and that no rule of general application can be announced."

[33 FR 17627, Nov. 26, 1968]

§ 15.312 Commission declined to approve proposed three party promotional plan in the food industry.

(a) The Commission issued an advisory opinion informing an applicant that his proposed three-party promotional plan in the food industry would violate statutes administered by the Commission.

(b) Under the plan, the promoter proposes to solicit sales of TV advertising time to suppliers of products retailed principally through grocery stores. The rates charged suppliers would be based exclusively on the television time furnished the supplier. In addition, each such supplier would receive the right to have its products promoted in the establishment of participating retailers.

(c) Retail participation in the plan would be solicited by the promoter through invitations published in trade journals of general circulation to the retail trades. Retailers would participate in the plan by providing special in-store displays of products specified by suppliers who purchase advertising time on the promoter's programs and by agreeing with such suppliers to maintain during the period of the promotion a reasonable inventory of the products involved in the in-store promotion. The display obligation of each participating retailer would be geared to the participating retailer's facilities and the product or products to be displayed by that retailer. In return, participating retailers would obtain advertising on the promoter's television programs in accordance with a formula giving each participating retailer a minimum 10-second advertising spot on a television program during the specified period of promotion. Additional 10-second spots would be allowed on the basis of the retailer's purchases during an immediate prior period of suppliers' products covered by the promotional plan.

(d) On the basis of the information submitted in connection with the application for an advisory opinion, it appeared to the Commission that the proposed arrangements for individual negotiations between suppliers and retailers with respect to display obligations of the retailers would probably violate section 2(d) of the Clayton Act, as amended, and possibly section 5 of the Federal Trade Commission Act. Furthermore, the plan made inadequate provision for informing the retailers of their opportunity to participate.

[33 FR 18990, Dec. 20, 1968]

§ 15.313 Marking of 18 karat white gold ring with platinum baguette prongs.

(a) The Commission rendered an advisory opinion in which it advised a ring manufacturer that it would be improper to place the following mark on rings composed of 18 karat white gold with platinum baguette prongs: "18K-Plat".

(b) In rejecting the proposed mark, the Commission cited the following two reasons: "First, since the prongs of the composed of 18 karat white gold with which resembles the color of the platinum baguette prongs, prospective purchasers might believe that the center prongs as well as the baguette prongs are also made of platinum. Second, to the uninitiated prospective purchaser, the proposed mark, coupled with the similarity in color of the entire ring, might mean that the ring is made in its entirety out of platinum consisting of 18 karat fineness."

(c) Similarly, the Commission also rejected two other proposed markings ("18K-10% Plat" and "90% 18K-10% Plat.") because they leave the consumer to speculate as to the exact part of the ring which is composed of platinum. Concluding that these two alternative suggestions are unacceptable, the Commission said: "Here, again, because of the similarity in color of the white gold and platinum the consumer might conclude that all of the prongs, including those for the center stone, are of platinum composition. Under these circumstances, it is not enough to merely say that the ring contains 10 percent platinum and 90 percent gold without disclosing the true composition of the various parts of the ring. In short, the Commission believes that the mark should clearly limit the platinum content to the baguette prongs and one possible suggestion would be as follows: '18K-baguette prongs Plat'. Any other language of equal clarity would, of course, be acceptable."

[33 FR 18990, Dec. 20, 1968]

§ 15.314 Advertising by manufacturers in an independently published periodical.

(a) The Federal Trade Commission was asked to express an opinion with respect to the legality of payment by manufacturers for the purchase of advertising space in a periodical published by a firm which has no connection whatever with any retail customer of such manufacturers and which will supply or otherwise make the periodical available without cost to all retailers.

(b) The advisory opinion noted that payments by a manufacturer for the purchase of advertising space in a periodical published by a firm which is not owned or controlled by, or in any way directly or indirectly affiliated with, any customer of that manufacturer, or group or class of such customers, do not violate sections 2(d) or (e) of the amended Clayton Act where no discriminatory benefit is conferred by such payments on a particular customer, or class or group of customers, over competitors. The periodical will be given nationwide distribution and will be supplied and otherwise made available without cost to all industry retailers; the periodical is not designed to be usable only by particular retailers, or classes or groups of retailers; every effort will be made to distribute the periodical as broadly as possible among industry retailers; and distribution will not be limited to any particular retailer, or group or class of industry retailers.

(c) The Commission advised that if the periodical is made available, in a practicable business sense, to all competing customers of a participating manufacturer, then no objection would be raised to payments by that manufacturer for advertising space therein. Further, that appropriate measures should be taken by the publisher to advise participating manufacturers that the periodical will serve to supplement, not supplant, their usual methods of notifying retail customers regarding the availability of their sales programs and that advertising the details of such program in the periodical will not relieve them from this statutory obligation.

[34 FR 724, Jan. 17, 1969]

§ 15.315 Foreign origin disclosure of wearing apparel partly made in a foreign country.

(a) The Commission rendered an advisory opinion in regard to the question of whether it is necessary to disclose the origin of textile products processed in Puerto Rico and the Dominican Republic from fabric produced in the United States, and thereafter exported to the mainland United States.

(b) Specifically, the Commission ruled upon the following two questions:

(1) Must a semimanufactured product with less than 50 percent of the value added in a foreign country be labeled in any way before entering the U.S. territory?

(2) If said product is then finished in Puerto Rico and shipped for distribution in the U.S. mainland, can it be labeled "Made in U.S.A."?

(c) In response to the first question, the Commission said that it will not be necessary to disclose the foreign country of origin where less than 50 percent of the value is added to the product insofar as the laws of the Commission are concerned.

(d) In regard to the second question, the Commission expressed the opinion that it would be improper to label such a product as "Made in U.S.A." because this would constitute an affirmative misrepresentation that the product is made in its entirety in the United States.

[34 FR 724, Jan. 17, 1969]

§ 15.316 Foreign origin disclosure of imported bearings.

(a) The Commission rendered an advisory opinion in regard to the proper marking of imported bearings.

(b) According to the facts presented in the matter, the top of the container in which the bearings will be packaged will carry the following statement: "The (word of a particular foreign country) Bearing". Also printed on the top of the container is the statement: "Made in (country of origin)". Etched on the outer race of each bearing is the inscription of the name of the foreign country of origin.

(c) Most of the bearings are sold to domestic manufacturers who use said bearings in their manufacture of heavy earth moving equipment and farm machinery. The bearings normally represent less than 2 percent of the total cost of the finished equipment. Domestic manufacturers who use the bearings in their production of machinery and equipment compete with one another for both domestic and foreign markets.

(d) Specifically, the following two questions were raised:

(1) Are the bearings marked with sufficient clarity to disclose they are manufactured in a certain foreign country?

(2) Is it necessary for the manufacturers who use the imported bearings in their machinery and equipment to disclose the country of origin of the bearings?

(e) In response to the first question, the Commission said that its examination of the markings revealed they were adequately marked to show their foreign country of origin.

(f) With respect to the second question, the Commission said that it would not be necessary for the manufacturers who use the bearings in their machinery and equipment to disclose the foreign country of origin of the bearings.

[34 FR 724, Jan. 17, 1969]

§ 15.317 Commission declines to issue advisory opinion.

The Commission declined to issue an advisory opinion on December 11, 1968 (File No. 693 7061), concerning a proposal by a training school to advertise a refund of charges to graduates who do not receive a timely offer of employment where the conditions stated might be the subject of such a wide variety of interpretations that only the manner of actual implementation would determine legality.

[41 FR 34594, Aug. 16, 1976]

§ 15.318 Commission refusal to grant blanket approval to small dairy to be acquired by any corporation subject to Commission acquisition-prohibiting orders.

(a) The Commission rendered an advisory opinion in response to a premerger clearance request from the owner of a small dairy who wants to sell the business to any one of three national firms in the dairy industry, two of which are subject to Commission cease and desist orders containing provisions prohibiting further acquisition without prior Commission approval.

(b) The applicant was advised by the Commission that it cannot grant the blanket approval requested. The Commission pointed out that corporations covered by orders prohibiting certain acquisitions are free, of course, to apply for prior approval to acquire the applicant's business.

(c) From the data submitted by the applicant, it appears that his business continues to operate profitably despite extremely competitive and rapidly changing conditions in the milk industry in his area. The applicant enjoys a substantial share of the markets in which he operates. No evidence was presented of any attempts to sell the business to any other independent dairy firm or to anyone now outside the dairy industry.

[34 FR 1648, Feb. 4, 1969]

§ 15.319 Sales price and lease rate for a book need not be identical.

(a) The Commission issued an advisory opinion concerning charges by a publisher in connection with the distribution of its publications.

(b) The publisher offers reference books to customers on lease (the publisher picks up the obsolete volumes upon issuance of a new edition or upon the expiration of the lease) or for purchase.

(c) The Commission advised the publisher that no law administered by the Commission requires it to charge the same amount for the lease as for the sale of a book.

[34 FR 1648, Feb. 4, 1969]

§ 15.320 Disclosure of origin of imported components used in manufacture of firearms.

(a) The Commission rendered an advisory opinion in regard to the question of whether it is necessary to disclose the origin of certain imported components to be used in the manufacture of revolvers and automatic pistols. If such disclosure is required, a question is raised as to the proper location of that disclosure.

(b) Specifically, the advisory opinion involved the use of components imported from both Germany and Italy, such as barrels, cylinders, and hammers. The remaining components were of domestic origin.

(c) With respect to the question of whether a disclosure of the origin of the imported components would be required, the Commission said: "In the absence of any evidence to the contrary, the Commission believes that the question of foreign origin disclosure largely depends upon the importance which prospective purchasers would attach to the fact, if known, that a substantial number of the components of the finished product are of foreign origin. It is the Commission's judgment that the imported components in both factual situations, namely, the barrels, cylinders, and hammers, represent such an integral and essential part of the finished product that prospective purchasers would in all probability manifest a deep concern over their origin and manufacture. If such is the case, then the failure to reveal the origin of the imported components would play a vital, if not decisive, role in the customers' selection or purchase. Under these circumstances, the Commission is of the opinion that the failure to reveal the country of origin of the imported components in both factual situations would likely result in deception to consumers and unfair injury to competitors."

(d) In regard to the question of whether the disclosure should be made on the product or the container, the Commission cited the well-established general rule that the disclosure should be clear and conspicuous. This means, the Commission said, that it must be placed in a location at the point of sale where it would be readily observed by prospective purchasers making a casual inspection of the merchandise prior to, not after, the purchase thereof. If the merchandise is displayed in such a manner that a disclosure on the product would not be seen prior to the purchase thereof, it would be necessary to place the disclosure on the container. On the other hand, if the merchandise is displayed in a manner which would permit purchasers to observe the disclosure on the product, it would not be necessary to make a disclosure on the container.

[34 FR 1824, Feb. 7, 1969]

§ 15.321 Sale of unlabeled American made products.

(a) The Commission issued an advisory opinion to an American manufacturer in response to his request concerning sale of one of his products with or without labels. He asked for the opinion because a dealer in another State has recently placed a substantial order for the product, specifying that it must be shipped in unlabeled containers. The supplier believes the dealer may intend to resell the product in export trade. The manufacturer does not enjoy a monopoly.

(b) The Commission advised the applicant that, under laws administered by the Commission,

"(1) You may legitimately refuse to sell a specific product to a customer who asks for it in an unlabeled container;

"(2) No labels are required on American made merchandise sold in export trade; however, an American exporter should determine what foreign laws govern the operations; and

"(3) Packaging and labeling of domestically sold consumer commodities are governed by the Fair Packaging and Labeling Act (Pub. L. 89-755) and the regulations issued thereunder. * * * The product described in correspondence, is a consumer commodity as defined in section 10(a) of the Act, therefore packaging or labeling of this product must be in accordance with the regulations. However, § 500.2(d) of the regulations which defines the term 'package' contains several exceptions which appear to apply to the facts in your situation. In addition your attention is invited to the exception contained in § 500.2(e) wherein the term 'label' is defined. Subsection (2) excepts, from application of the regulations written, printed, or graphic matter affixed to or appearing upon commodities sold or distributed to industrial or institutional users."

[34 FR 1825, Feb. 7, 1969]

§ 15.322 Supplier advertising in an independently published periodical.

(a) The Federal Trade Commission was asked to express an opinion with respect to the publication and distribution of a monthly publication designed to supply wholesale and retail outlets, without cost to them, with information concerning promotional allowance programs instituted by manufacturers selling to such outlets, and with particular reference to two specific questions:

(1) Will a manufacturer who places in the publication a clear and timely description of the terms of a promotional program offer and the conditions upon which payments will be made be regarded as having notified a customer, who in fact receives the publication, of the availability of that promotional offer?

(2) In the case of a promotional offer which extends over a 6-month period, will such manufacturer be regarded as having so notified a retailer,

who in fact receives the publication each month, if the description is placed therein only once, prior to or at the beginning of the 6-month period? If not, how often must the notice be republished? At 3-month intervals? In each monthly issue?

(b) The advisory opinion noted that payments by a manufacturer for the purchase of advertising space in a periodical published by a firm which is not owned nor controlled by, or in any way directly or indirectly affiliated with any customer of that manufacturer, or group or class of such customers, do not violate section 2 (d) or (e) of the amended Clayton Act where no discriminatory benefit is conferred by such payments on a particular customer, or class or group of customers, over competitors. The periodical will be given nationwide distribution and will be supplied and otherwise made available without cost to all industry wholesalers and retailers. The periodical is not designed to be usable only by particular resellers, or classes or groups of resellers; every effort will be made to distribute the periodical as broadly as possible among industry resellers; and distribution will not be limited to any particular reseller, or group or class of industry resellers.

(c) The Commission advised that if the periodical is made available, in a practical business sense, to all competing industry resellers of a participating manufacturer's products, then no objection would be raised to payments by that manufacturer for advertising space therein.

(d) Regarding the two specific questions, the Commission advised that although a listing by a manufacturer of the details of his promotional allowance program in the publication would appear to be adequate and sufficient notification to recipients thereof that such programs are available and under what specific conditions, such listing does not, however, relieve any manufacturer-advertiser from his statutory obligation of informing those resellers who may not receive the publication regarding the availability of such program.

(e) And further, as to the second specific question, in view of the fact that the publisher will update the master mailing list every 3 months, the Commission required that notices of extended promotional offers be republished each calendar quarter. It was pointed out, however, that the quarterly notice republication requirement was being imposed to coincide with presented facts and that notice given at less frequent intervals may be adequate in other situations. If the required notice is in fact given it is immaterial whether it is republished at any particular interval of time so long as all those entitled to promotional assistance are made aware in timely fashion of any benefits to which they may be entitled under a published program.

[34 FR 1825, Feb. 7, 1969]

§ 15.323 Disclosure of imported electronics equipment.

(a) Rather than labeling an imported product as "made" in a certain foreign country, the Commission said it would interpose no objection to a disclosure which stated that the merchandise was a "product" of a certain foreign country.

(b) The advisory opinion was rendered in response to a request from an importer of electronics equipment which enters the United States in a completely finished state. Included in the equipment are radios, tape recorders, transceivers, etc.

[34 FR 2111, Feb. 13, 1969]

§ 15.324 "Free hosiery for life" offer to obtain sales representatives.

(a) The Commission rendered an advisory opinion in regard to the propriety of advertising which offers information for "free hosiery for life" in connection with the sale of hosiery.

(b) According to the proposed plan, one who responds to the advertisement will receive information offering the recipient a job selling hosiery, and for every certain number of hosiery which is sold the recipient will receive a free pair of hosiery.

(c) In the advisory opinion which was rendered, the Commission said that the use of the word "free" under the above circumstances would be deceptive and therefore in violation of section 5 of the Federal Trade Commission Act, unless the initial advertisement and any subsequent promotional material contains a clear and conspicuous disclosure of all of the conditions or prerequisite to the receipt and retention of the free merchandise.

[34 FR 2551, Feb. 25, 1969]

§ 15.325 Marketing 10-year-old unused equipment as new is deceptive.

(a) The Commission issued an advisory opinion concerning the marketing now as "new" of 10-year-old equipment which has never been used and is still in the original shipping cartons.

(b) The Commission wrote the applicant for the advisory opinion: "According to the information you submitted, your company is not the original manufacturer of the equipment you are interested in marketing as 'new'. Further, it is understood you have recently obtained a license to manufacture similar equipment. Also, you state there have been no model change since the 10-year-old equipment was produced. Having considered the matter, the Commission hereby advises you that you would risk violating section 5 of the Federal Trade Commission Act if you marketed the 10-year-old equipment as 'new'; such an act would clearly be deceptive. Of course, you are free to describe the equipment accurately and disclose that it is 10 years old and has never been used."

[34 FR 2551, Feb. 25, 1969]

§ 15.326 Country of origin marking requirements for product assembled in Puerto Rico of domestic and foreign components.

(a) The Commission's opinion was requested as to the legality of marking as "Made in the U.S.A." a Puerto Rican produced product composed for the most part of domestic components but containing some components originating in the United Kingdom.

(b) In the Commission's view, the unmodified marking "Made in U.S.A.", or equivalent, would be an affirmative representation that the product in question is in its entirety of domestic origin.

(c) Since in the situation described, the product in question is not wholly of domestic origin the Commission is of the opinion that the marking "Made in U.S.A.", or equivalent, would be improper, unless additional and accurate disclosure is made of the presence of the imported components.

(d) The requesting party was further advised that the Commission would not object if the product in question were to be marketed with no accompanying identification of, or claim as to, country of origin.

[34 FR 2552, Feb. 25, 1969]

§ 15.327 Disclosure not required of origin of imported upper material used in shoes.

(a) The Commission rendered an advisory opinion to a manufacturer of athletic shoes stating that it would not be necessary to disclose the country of origin of the imported upper material.

(b) The imported upper material will represent approximately one-third of total material costs, and the remaining two-thirds will be composed of material made either in the United States or Puerto Rico. Concluding that a disclosure of the imported upper material would not be required, the Commission said: "In the absence of any affirmative misrepresentation as to origin, the Commission is of the opinion that, under the facts as presented, it will not be necessary to disclose the country of origin of the imported upper material."

[34 FR 3742, Mar. 4, 1969]

§ 15.328 Organization of warehouse distribution center for a jobber buying group.

(a) The Commission issued an advisory opinion warning of probable violations of law in the proposed organization by an automotive replacement parts manufacturers' representative of a warehouse distribution center buying group of jobbers.

(b) According to the information submitted, the applicant is now, and intends to continue to be, a sales agent for several automotive parts manufacturers. He proposes to organize and operate a warehouse distribution center for automotive parts, obtaining quantity discounts on purchases from suppliers and then reselling at a 5 percent to 7 percent markup to "member" jobbers. The quantities will be the result of pooled orders from the jobbers. Jobbers will be "members" only in the sense that they will contribute $1,000 each to the applicant in return for the privilege of sharing some of the quantity discounts on purchases from suppliers. The applicant and his wife will be the sole owners, operators, and employees of the warehouse distribution center. Drop shipments will be used when orders are large enough to obtain quantity discounts for the particular orders. The applicant intends to organize only one jobber in each of the smaller towns and perhaps two or more in larger towns "where they would not be competing for the same customers." The center will place orders with manufacturers, receive goods not otherwise drop-shipped and distribute them, bill jobber-customers (i.e., "members"), and slowly accumulate an inventory in its warehouse.

(c) The Commission is of the opinion that the applicant would probably violate section 2(c) of the amended Clayton Act if he receives commissions from manufacturers whom he represents as a sales agent on purchases for his own account for resale to jobbers.

(d) The Commission also pointed out that, while buying groups of jobbers are not illegal per se, they may function in ways to violate section 2(f) of the amended Clayton Act if they refuse membership to jobbers who compete with each other and thereafter obtain unjustified price discriminations.

[34 FR 3742, Mar. 4, 1969]

§ 15.329 Dissemination of uniform warranty plan by trade association to members.

(a) The Commission rendered an advisory opinion to a trade association of retailers that its proposal to circulate a uniform warranty among its membership would likely result in violation of Commission administered laws. The warranty in question, applicable within 100 miles of a dealer's store, provides:

(1) The extent of the liability of this firm to service merchandise purchased from us is limited to this policy and it is in addition to any written guarantee included from the manufacturer involved.

(2) Under conditions of normal usage, our store warrantees (sic) our (products) to be free from defects in workmanship and structural materials for a period of 1 year from the date of purchase. This guarantee does not apply to damages resulting from negligence, misuse, or accidents.

(3) We will repair or replace at our option any defective item, or part, at absolutely no charge. In determining the cause or nature of the defect, and the manner of repair, the judgment of this firm will be final.

(b) The Commission concluded that it could not render advice with respect to that portion limiting retailer liability to the warranty terms nor to the comment that the warranty is in addition to any manufacturer's written guarantee. This position was taken for the reason that the question of warranties is being currently examined, specifically as they relate to the automotive industry, and any Commission statement along these lines at this time would be premature.

(c) Nor could the Commission approve the remainder of the proposed warranty for the reason that it is not a simple generalized guideline intended to assist the membership in drafting warranties embracing their own terms but is, in fact, an actual 1 year warranty incorporating predetermined and definite terms and conditions for use without change by members. For this reason the Commission advised that should the proposed warranty be selected by all or a substantial number of Association members the likely purpose and probable result would be the adoption of anticompetitive uniform terms and conditions by the membership and would, therefore, be objectionable.

[34 FR 5061, Mar. 11, 1969]

§ 15.330 Proposed advertising for orthopedic pillow.

(a) The Commission was requested to render an advisory opinion with respect to proposed advertising for a pillow intended for orthopedic and therapeutic purposes, which would represent that the device was designed for use in cervical spine, low back pain cases and by cardiac patients.

(b) The opinion advised the advertisers that while the Commission has no objection to representations that the device might afford temporary relaxation and comfort under certain conditions, any representations in advertising that the pillow is a health device particularly useful for cervical spine, low back pain and cardiac cases would appear to have the capacity and tendency to deceive.

[34 FR 5061, Mar. 11, 1969]

§ 15.331 Disclosure of origin of imported food product.

(a) The Commission rendered an advisory opinion to a trade association which involved the question of whether it is necessary to disclose the origin of an imported food product. Imported in its entirety, the product is later sliced and packed in containers in the United States for sale to the general public.

(b) Ruling that the product's origin must be disclosed, the Commission said: "* * * as to this product, the country of origin may be a material fact to many consumers in deciding whether to make a purchase, and that it should therefore be disclosed to them in an appropriate manner at the point of sale."

[34 FR 5061, Mar. 11, 1969]

§ 15.332 Publication of advertising standards by private association.

The Commission issued an advisory opinion on February 12, 1969 (File No. 693 7094), to the effect that a private association's publication of a statement of practices heretofore found unlawful by the Commission for voluntary agreement by industry members to avoid the listed practices would not be objectionable. The Commission advised that it would have no objection to such a publication, or proposed use, as long as each signer agrees to, and abides by, its provisions without coercion, expressed or implied.

[41 FR 34594, Aug. 16, 1976]

§ 15.333 Manufacturer-wholesale relationships; different discounts; refusals to deal; termination of further sales.

(a) The Commission issued an advisory opinion in response to a request from a manufacturer concerning several courses of action he proposes to take in his sales relationships with wholesalers.

(b) The manufacturer now grants all wholesalers a 40 percent discount off the list price of his products. Proposed are new contracts, providing the 40 percent discount to a Full Service Dealer or Wholesaler who performs certain specified functions, and only 25 percent to a Part Service Dealer or Wholesaler "who does not fulfill all the functions set forth" in the definition provisions for a Full Service Dealer or Wholesaler.

(c) The Commission advised: (1) "To the extent that an additional discount is sought to be justified on the basis of functional services such as stocking and display performed by so-called Full Service Dealers or Wholesalers [function No. 4 of applicant's proposed wholesaler agreement], no advisory opinion can be provided at this time because the Commission contemplates an inquiry looking toward a rulemaking proceeding involving this question as it pertains to another industry.

(2) "Moreover, as to the other functional criteria for Full Service Dealers or Wholesalers set forth in applicant's proposed wholesaler agreement, the Commission will not approve any standards whereby a wholesaler's eligibility for added discounts is contingent upon the imposition of specified restrictions upon his customers by him.

(3) "You also ask if you may refuse to deal with a wholesaler in one town who is reselling your products to wholesalers in another town. The Commission is of the opinion that such refusal to deal could amount to a violation of section 5 of the Federal Trade Commission Act. Therefore, the Commission cannot approve the proposal.

(4) "Additionally, you ask if you may terminate further sales to a wholesaler who is establishing his own network of wholesale dealers, obligated by contract to purchase their supplies exclu-

sively from him. This wholesaler, as does the one involved in your second request, is departing from the traditional role of the wholesaler in the beauty and barber supply business by refusing to confine his sales to beauty schools and salons and has, in effect, entered into competition with your company as a supplier of [your] products to wholesale dealers. The facts provided do not give any basis for viewing the wholesaler's exclusive dealing arrangements as violative of the antitrust laws. Without reaching the question of whether you might terminate further sales to the wholesaler if the exclusive dealing contracts were illegal, the Commission believes your proposed termination of the wholesaler would appear to be anticompetitive and thus contrary to the provisions of section 5 of the Federal Trade Commission Act. The proposal, therefore, cannot be approved."

[34 FR 6654, Apr. 18, 1969]

§ 15.334 Location of foreign origin disclosure.

(a) The Commission advised an importer of candles and candle holders in regard to the proper location of the foreign country of origin disclosure thereof.

(b) After importation, the product will be assembled in a combination blister package of eight candles and eight holders on a display card for resale to the general public. The imported holders and candles will be marked with their respective country of origin. However, this identification as to foreign origin will not be readily seen by prospective purchasers making a casual inspection of the merchandise prior to the purchase thereof.

(c) In regard to the question of whether the disclosure should be made on the product or on the face of the display card, the Commission said: "* * * the general rule is that the disclosure must be clear and conspicuous. This means that it must be placed in a location where it would be readily observed by prospective purchasers making a casual inspection of the merchandise prior to, not after, the purchase thereof."

[34 FR 6655, Apr. 18, 1969]

§ 15.335 Refusal of membership in trade association.

The Commission issued an advisory opinion on February 18, 1969 (File No. 693 7078), concerning the right of a trade association to refuse membership to a member's competitor at the member's insistence. The Commission advised that, as a general rule, a trade association may deny membership for failure to meet reasonable qualifications, but may not deny membership to a potential member if to do so would unreasonably restrain interstate or foreign trade or commerce.

[41 FR 34594, Aug. 16, 1976]

§ 15.336 Legality of membership by brewer in beer wholesalers' trade association.

Responding to an application from a beer wholesalers' association the Commission advised the applicant that:

(a) "* * * it is not illegal per se for suppliers to belong to a wholesalers' trade association, but particular care must be exercised to avoid violation of law. In the case of an industry where distributors are in a weak bargaining position, vis-a-vis, their suppliers and where the industry on the supply side is concentrated, these circumstances may lead to vertical restraints on the distributors violative of the antitrust laws for example in the area of pricing decisions. These considerations may apply in the case of the beer industry. The necessity of preserving its members' independence in making business decisions should, of course, be taken into consideration by trade association when they formulate membership policies.

(b) "The Commission further advised the applicant that it is not a violation of the antitrust laws to exclude suppliers from membership in a wholesalers' organization."

[34 FR 6519, Apr. 16, 1969]

§ 15.337 Disclosure of origin of imported hand sprayers and squeeze bottles.

(a) The Commission issued an advisory opinion concerning the proper labeling as to the origin of imported, small, plastic, hand-operated sprayers and two-piece plastic squeeze bottles.

(b) The applicant advised the Commission that the imported articles would be sold in quantity to manufacturers or suppliers of cleaning liquids or other industrial accounts. These purchasers would furnish the imported articles to industrial users for dispensing cleaning liquids supplied by these purchasers.

(c) The Commission advised the applicant that on the basis of the facts as presented the country of origin of the imported sprayers or squeeze bottles should appear conspicuously on the cartons in which they are shipped to his customers. In the absence of any affirmative representation that these products are made in the United States or any other representation that might mislead the ultimate purchasers or users as to the country of origin and in the absence of any other facts indicating actual deception, the failure to mark the origin of these articles on them would not be regarded by the Commission as deceptive. Accordingly, no marking is required on these articles with reference to the country of origin.

[34 FR 6907, Apr. 25, 1969]

§ 15.338 Disclosure of origin of imported seam ripper blades.

(a) The Commission rendered an advisory opinion concerning the proper marking of the origin of seam ripper blades imported from Germany. The imported blades will be assembled with handles of domestic origin.

(b) The Commission advised the party seeking the opinion that it would be necessary to make clear and conspicuous disclosure of the foreign country of origin of the imported blades.

[34 FR 6907, Apr. 25, 1969]

§ 15.339 Disclosure of origin of imported fishing lures.

(a) In response to a request for an advisory opinion, the Commission ruled that it would be necessary for the requesting party to make a clear and conspicuous disclosure at the point of sale of the foreign country of origin of its imported fishing flies.

(b) Under the factual situation presented in the ruling, the flies will be shipped to retailers for resale packaged 1 dozen loose in a plastic box. Each box will contain from 1 to 4 flies made in a foreing country and 8 to 11 flies of domestic origin. Fishermen normally will purchase the flies singly and not by the dozen.

[34 FR 7008, Apr. 29, 1969]

§ 15.340 Location of foreign origin label on imported engine parts.

(a) In response to a request for an advisory opinion, the Commission advised an importer of fuel injection parts and units, which are to be used as replacement parts in engines, that it could disclose the foreign origin thereof on the container rather than on the product.

(b) The engines are purchased by industrial and commercial users, and by individual consumers as well. Whenever possible, the imported products will be marked with the country of origin on the nameplate. Furthermore, the imported parts and units may be packaged individually or in certain specific quantities per box. Because a number of the imported replacement parts are either too small to permit country of origin identification on the product itself, or may have highly finished surfaces which would be destroyed with marking, the question was raised as to whether it would be permissible to make the disclosure only on the container.

[34 FR 7008, Apr. 29, 1969]

§ 15.341 Disclosure of origin of imported motors.

(a) In response to a request for an advisory opinion, the Commission ruled that it would not be necessary to disclose the foreign origin of certain electric motors or components thereof which are imported from Poland.

(b) According to the facts presented by the requesting party, the imported motors will be attached in the United States to domestically made gear trains. Moreover, the imported motor will represent approximately one-third of the total cost of the finished unit, i.e., the motor and the gear train.

(c) Concluding that a disclosure would not be required under these circumstances, the Commission said: "In the absence of any affirmative representation that the imported motors are made in the United States, or any other representation that might mislead purchasers as to the country of origin, the Commission is of the opinion that, under the facts presented, the failure to mark the origin of the imported motors or components thereof will not be regarded by the Commission as deceptive."

[34 FR 7145, May 1, 1969]

§ 15.342 Location of term "irregular" to describe shirts.

(a) In response to a request for an advisory opinion, the Commission advised a manufacturer that irregular men's dress and sport shirts should be stamped "irregular" on the neck band, not on the shirttail.

(b) Whenever an affirmative disclosure is required, the Commission said, it is a well-established principle that it must be made with such clarity that it will likely be observed by prospective purchasers making a casual inspection of the merchandise prior to, not after, the purchase thereof. Because of the manner in which shirts are ordinarily folded and displayed at the point of sale, the Commission added, an "irregular" stamp on the shirttail would not normally be seen by prospective purchasers until after the sale has been consummated.

(c) Concluding that the disclosure should be made in the neck band, the Commission said: "Although the disclosure may be placed in any location so long as it complies with the aforementioned principle, experience indicates that the best possible location in most cases would be in the neck band. This is where most prospective purchasers look at a shirt because this is where the size and fiber identification normally are placed. Under these circumstances, therefore, the Commission would not accept a disclosure made on the shirttail. It would, however, accept a legible disclosure made in the neck band as being in compliance with section 5 of the FTC Act."

[34 FR 7145, May 1, 1969]

§ 15.343 Disclosure of origin of imported circular saw discs.

(a) In response to a request for an advisory opinion, the Commission ruled that it would not be necessary to disclose the foreign origin of imported circular steel saw discs.

(b) After importation, the manufacturer will add tungsten carbide tips to the imported discs. Domestic parts and labor represent approximately 80 percent of total production costs, with the remaining 20 percent representing the cost of the imported discs. The finished blades will be sold to cabinet shops, schools, builders, industrial concerns, and hobbyists.

[34 FR 7234, May 2, 1969]

§ 15.344 Premerger clearance not granted; grocery stores in concentrated market.

(a) The Commission advised an applicant for an advisory opinion that it cannot grant clearance for a proposed merger of two grocery retailing corporations operating in the same metropolitan marketing area.

(b) Applicant is the owner of three supermarkets having 1.5 percent share of the particular market. The proposed purchaser is a regional supermarket chain having 18 percent to 20 percent of the same market with a ranking of second among all the companies selling groceries in the area. The market is concentrated with the four leading companies sharing 57 percent according to one survey and [illegible]4 percent of all sales as calculated by another analyst.

(c) The Commission advised the applicant that it believes that the proposed merger would raise substantial questions of legality under the merger laws and that it therefore cannot grant the clearance requested.

[34 FR 7235, May 2, 1969]

§ 15.345 Survey of professional compensation by employing institutions.

(a) The Commission issued an advisory opinion with respect to a proposed survey of certain professional compensation in employing institutions.

(b) The applicant proposed to conduct a survey of employing institutions by means of a questionnaire to ascertain the compensation being paid to specified professionals. Respondents to the questionnaire would not be identified. The results of the survey would be reported as national and regional averages and they would be published and distributed to the trade and public press. No conclusions would be drawn nor would recommendations be made.

(c) The Commission advised the applicant that implementation of the proposed course of action in the manner described probably would not violate any of the laws administered by the Commission.

[34 FR 7278, May 3, 1969]

§ 15.346 [Reserved]

§ 15.347 Disclosure of origin of imported shoes.

(a) In response to a request for an advisory opinion, the Commission ruled that it would be necessary for the requesting party to make a clear and conspicuous disclosure of the foreign country of origin of its imported shoes.

(b) Under the factual situation present in the ruling, it was assumed that the shoes were entirely of foreign manufacture and after importation they were to be sold to the general public.

[34 FR 7445, May 8, 1969]

§ 15.348 Disclosure of origin of imported turpentine.

(a) The Commission advised a company that a "Packaged in U.S.A." statement standing alone would not be sufficient, and that it would be necessary to make a clear and conspicuous disclosure on the package of the foreign country of origin of the imported turpentine.

(b) Under the factual situation presented for a ruling, the company plans to import turpentine from either Portugal or the U.S.S.R. After importation, the turpentine will be repackaged here in the United States into 1 gallon, 1 quart, and 1 pint containers for resale for general consumer use.

[34 FR 8093, May 23, 1969]

§ 15.349 Disclosure of origin of imported components used in fork lift trucks.

(a) In response to a request for an advisory opinion, the Commission advised a company that one of its statements would not be proper but that it would not object to its other proposed statement. The company had requested an opinion in regard to the proper marking and advertising of fork lift trucks made partly of imported components with specific reference to the following two statements:

(1) "Assembled in U.S.A."

(2) "Assembled in U.S.A. of components of USA & Imports".

(b) The trucks will be sold to industrial users through various sales agencies throughout the United States, and the agencies will have on display at least one or two models to show to prospective purchasers. It is anticipated that parts imported from Bulgaria will represent approximately 40 percent of total production costs, parts, and labor assembly costs in the United States will represent 30 percent and the remaining 30 percent will represent parts imported from one of the following five countries: West Germany, France, England, Denmark, and Japan. Thus approximately 70 percent of total production costs will consist of imported components.

(c) In the opinion which was rendered, the Commission concluded that it could not accept the first proposed statement as being in conformity with section 5 of the FTC Act. However, the Commission said, it would interpose no objection to the use of the second proposed disclosure—"Assembled in U.S.A. of components of USA & Imports."

[34 FR 11140, July 2, 1969]

§ 15.350 Accreditation program for producers of concrete and concrete products.

(a) The Commission rendered an advisory opinion involving a proposed accreditation program in the construction industry, including the award of a certificate of accredation. The program is designed to upgrade and maintain the quality of a building material.

(b) Under the proposed program, the sole criterion for accreditation and the award of a certificate of accreditation of established firms will be provable ability to function effectively in the field of concrete construction, and any applicant who has a satisfactory record of accomplishment as certified by the architect or engineer for whom concrete work was done will be accredited. Certificates will be renewed annually solely on the basis of satisfactory performance during the preceding year. The failure to maintain satisfactory performance standards could result in deaccreditation and withdrawal of the right to use the certificate. General supervision of the proposed program of accreditations will be vested in a Board of Directors, no member of which will have any financial interest in the product as might affect his impartiality under the program. The Board will have the responsibility, among other matters, for insuring nondiscriminatory administration of and free access to the program.

(c) There will be no requirement for any applicant as to the length of time in business, his capital, or size of operation. Applicant firms with no previous experience in the industry but having personnel of sufficient background and experience in concrete construction or related fields and which express a desire to engage in quality concrete constructions will be accredited. All present and future applicants will have free, unrestricted and nondiscriminatory access to the program, whether or not they are a member of any sponsoring organization. All nonmember applicants will be accorded an equal opportunity for accreditation at a cost no greater than and under conditions no more onerous than those imposed upon comparably situated organization members for whom comparable services may be rendered. A uniform certificate of accreditation will be awarded to all who qualify.

(d) The Commission advised that it would not proceed against the practices so long as they are implemented in the manner described. The requesting party was advised further that in giving its approval to this request the Commission in expressing no opinion with respect to product standards which may be or are now established and that the approval will be of no force and effect should the proposed program of accreditation be implemented in contravention of Commission-administered law. The Commission added that should the proposed program be adopted the Commission may, from time to time, wish to assure itself that it is being used for the limited purposes intended.

[34 FR 11140, July 2, 1969]

§ 15.351 Use of symbols and names having fur-bearing animal connotations in labeling textile fiber products.

(a) The Commission was requested to render an opinion with respect to the labeling of textile fiber products manufactured so as to simulate a fur or fur product.

(b) The requesting party proposed to use a word closely resembling the name of a fur-bearing animal, the fur from which is commonly used in the manufacture of garments, in association with a fabric simulating that fur.

(c) In the Commission's view, the use of the proposed term to describe such a fabric would probably violate the Textile Fiber Products Identification Act and/or that part of section 5 of the Federal Trade Commission Act which makes deceptive acts or practices in commerce unlawful.

[34 FR 11199, July 3, 1969]

§ 15.352 Stereo tape cartridge club; consumer credit regulations will apply.

(a) The Commission issued an advisory opinion in response to an application from a businessman who proposed to organize a stereo tape cartridge club.

(b) The Commission wrote the applicant:

(1) "You state that the idea of the club is to allow club members to exchange ten tape cartridges per month. A membership will cost $480, to be paid in 30 monthly installments of $16 each. That meets the definition of consumer credit which is credit offered or extended to a person primarily for personnel, family, household, or agricultural purposes and for which a finance charge is imposed or which is

repayable in more than four installments.

(2) "Enclosed for your guidance is a copy of the Federal Reserve press release of February 7, 1969, containing Regulation Z issued under the Truth In Lending Act. With some exceptions, the Federal Trade Commission has the principal enforcement duties. The Commission points out that all relevant provisions must be complied with by anyone extending or arranging for consumer credit. A potential club member in your program is entitled to full disclosure of all financial arrangements, including the fact that a third party may hold the promissory note for collection.

(3) "In addition to your straight retail memberships, you contemplate a 'cooperative' membership to be offered in return for certain promotional cooperation. The Commission invites your attention to the enclosed copy of the Commission's Guides Against Deceptive Pricing, effective since January 8, 1964. You will note that it might be an actionable deceptive practice prohibited by law to identify a commodity as having a certain retail value unless that is a price at which identical commodities have in fact been sold in substantial quantities. No conclusion of legality or illegality is possible in the instant matter on the basis of the brief information you have submitted.

(4) "Further, you are advised that it might also be an actionable deceptive practice prohibited by law to fail to fully inform a potential club member not only about all financial arrangements and the accurate retail value of the cartridge player but also about the nature and function of the player; e.g., is the player a self-contained playing machine or does it need an amplifier and speakers to render performance?

(5) "For postal regulations, you should consult your local postmaster."

[34 FR 11199, July 3, 1969]

§ 15.353 Use of the term "hand carved" to describe furniture.

(a) The Commission issued an advisory opinion with respect to the use of the term "hand carved" to describe certain furniture.

(b) The manufacturing procedure for the furniture calls for a prototype to be completely constructed and carved by hand. Then, the prototype becomes a pattern for an intricate machine which "rough cuts" the carvings on subsequent pieces for assembly production. Each piece so manufactured then has intricate hand detailing, carving and finishing to the extent that each piece is, in fact, different in artistic detail from the one which follows it. Each piece is numbered and signed by the craftsman who completes it.

(c) The Commission expressed the view that using the term "hand carved" to describe furniture manufactured in the manner described would probably violate the Federal Trade Commission Act, section 5.

[34 FR 11418, July 10, 1969]

§ 15.354 [Reserved]

§ 15.355 Disclosure of origin of partly foreign-made textile products.

(a) The Commission advised a manufacturer of men's and boys' slacks that it would not be necessary to disclose the fact that certain assembly and sewing operations are performed in a specified foreign country.

(b) Under the facts presented to the Commission, the slacks consist of cotton and synthetic woven fabrics and threads, and steel hooks and eye enclosures, all of which are made in the United States. Said materials are inspected and cut to pattern in the United States and certain assembly steps, such as the sewing of belt loops and the attachment of zipper chains, are also performed domestically. Thereafter, they are shipped to the company's plant in a foreign country where they are further assembled and sewn. Finally, they are returned to the United States where the buttonholes are sewn, the buttons attached, and the pants are pressed, inspected, cured, and prepared for shipment to customers.

(c) The cost of the foreign assembly and sewing operations is approximately 13.5 percent of total production costs, and the company wanted to know whether it would be necessary to disclose the nature and extent of the foreign operations either under section 5 of the FPC Act or section 4(b)(4) of the Textile Fiber Products Identification Act. It was further understood that the company does not intend to label the slacks as "Made in U.S.A." or use any other words of similar import.

[34 FR 11418, July 10, 1969]

§ 15.356 [Reserved]

§ 15.357 Supplier services furnished through third party.

(a) The Commission advised a requesting party that his proposed plan would be governed by the provisions of section 2(e) of the amended Clayton Act, as interpreted by the Commission's recently issued Guides for Advertising Allowances and Other Merchandising Payments and Services.

(b) In return for chain officials' time in considering supplier proposals, a third party intermediary proposed to provide merchandising advice of a perhaps general nature. The requesting party considered his proposed action to be outside the scope of section 2(e).

(c) The Commission concluded that implementation of the plan would be likely to result in a violation of section 2(e) if the plan were to be offered only to chains and if usable and suitable alternatives were not offered to those competing customers who could not use the basic plan.

[34 FR 11492, July 11, 1969]

§ 15.358 Disclosure of foreign country where textile products are assembled.

(a) The Commission advised two manufacturers of textile fiber products that it would not be necessary to disclose the name of the foreign country where certain finishing operations are performed.

(b) In both cases, the fabric is of domestic origin. In one case, the company will ship its American-made fabric and findings to the Dominican Republic where the fabric will be cut, sewn, finished, and returned for resale to the industrial rental laundry industry. Labor services performed in the foreign country will represent approximately 30 percent of total production costs.

(c) The other company, which is engaged in the manufacture and sale of ladies' undergarments, will cut the material in the United States and then ship it to Haiti where it will be sewn and finished. The company's foreign labor costs will represent approximately 20 percent of total production costs.

(d) Both companies were advised by the Commission that it would not be necessary to disclose in the labeling the nature and extent of the foreign operations performed on the textile products either under section 5 of the FTC Act or section 4(b)(4) of the Textile Fiber Products Identification Act.

[34 FR 11492, July 11, 1969]

§ 15.359 Trade association's proposed compilation and publication of certain financial data.

(a) The Commission issued an advisory opinion in response to a request from a trade association concerning a proposed survey to be conducted among its members.

(b) The proposed survey seeks industry data for 1966, 1967, and 1968 confined solely to the following items:

(1) Percent return on total investment;

(2) Percent net profits (after taxes) to total sales;

(3) Percent advertising cost to gross sales;

(4) Percent direct labor cost to gross sales;

(5) Ratio current assets to current liabilities;

(6) Ratio net sales to inventory; and

(7) Ratio net sales to net working capital.

(c) The association proposes to obtain the information from its members on a confidential basis, to tabulate the data without identifying any company, and then to publish the results.

(d) The Commission advised the applicant that it does not object to the proposed survey, compilation, and publication of industry financial data as outlined above and on the basis stated i.e., that there will be no disclosure of the name of any company participating. It is to be understood that this advisory opinion is necessarily limited to this particular program. However, the Commission invites submittal of any other proposed financial surveys in definite form for Commission advisory opinions.

[34 FR 11492, July 11, 1969]

§ 15.360 Use of descriptive phrase to describe furniture.

(a) The Commission issued an advisory opinion with respect to the use of a descriptive phrase such as "[Trade Name] furniture combines modern production methods with hand-carving and finishing" to refer to certain furniture.

(b) The manufacturing procedure for the furniture calls for a prototype to be completely constructed and carved by hand. Then, the prototype becomes a pattern for an intricate machine which "rough cuts" the carvings on subsequent pieces for assembly production. Each piece so manufactured then has intricate hand detailing, carving, and finishing, to the extent that each piece is, in fact, different in artistic detail from the one which follows it. Each piece is numbered and signed by the craftsman who completes it.

(c) The Commission expressed the view that using a descriptive phrase such as "[Trade Name] furniture combines modern production methods with handcarving and finishing" to refer to furniture manufactured in the manner described probably would not violate the Federal Trade Commission Act, section 5.

[34 FR 12824, Aug. 7, 1969]

§ 15.361 Credit reporting plan by trade association.

(a) In response to a request for an advisory opinion, the Commission ruled that it would interpose no objection to a credit reporting plan by a trade association, as long as five conditions are met.

(b) The proposed plan would cover only past due accounts in three categories: (1) Where legal suit has been filed, (2) those accounts which have been turned over to a bona fide collection agency, and (3) where the debtor has gone into bankruptcy. The secretary of the association would keep a list of such accounts reported to her by the active members. In response to an inquiry from an active member concerning a particular customer, the secretary would, without disclosing the name of the reporting member, advise the inquiring member whether or not any one of the three aforementioned adverse credit actions had been reported. Available only upon the specific request of an active member, the credit information would not be for broad publication to all members of the association.

(c) In addition, a reporting member would have to submit evidence in support of any one of the three adverse credit actions being reported. Absent such evidence, the reporting member would have to refer the secretary of the association to a reliable source where this information could be confirmed. The purpose of this requirement is to prevent the reporting of any rumors with respect to a customer's credit rating.

(d) The Commission advised that the exchange of credit information concerning delinquent debtors through a trade association is not unlawful under section 5 of the FTC Act *Provided*:

(1) The members of the association are left free to determine on the basis of their individual judgment whether or not to sell to delinquent debtors and on what terms;

(2) There is no agreement among members in regard to credit terms, prices, or any other joint action which illegally restrains trade;

(3) That the reporting member indicates that a debt turned over to a collection agency was treated by the debtor as offset or was otherwise disputed, where that is the case;

(4) The association furnishes to the debtor the same credit information reported by a member at the time the request is answered; and

(5) In order for the debtor to have the opportunity to correct his credit record, if he believes it needs correcting, the association must pass on to the inquiring member any explanatory statements which the debtor may submit; the identity of the inquiring member need not be revealed to the debtor. As long as the proposed plan

meets these five requirements in actual operation, the Commission would interpose no objection with respect thereto.

[34 FR 13272, Aug. 15, 1969]

§ 15.362 Full disclosure of facts necessary when seller of one product makes gift of another product to purchaser in exchange for names of prospective purchasers.

In response to a request for an advisory opinion, the Commission advised a manufacturer under an order prohibiting it from representing, directly or indirectly, that its products can be had at no cost to the purchaser or that such products can be had in exchange for the names of a given number of prospective purchasers, unless a full and complete disclosure is made of the facts and circumstances surrounding the offer, that it considered the following to constitute sufficient disclosure:

(a) Purchaser to furnish, at time of purchase, the names and addresses of six prospective purchasers.

(b) Prospects must reside in the sales area of manufacturer's distributor making the original sale.

(c) For voluntarily furnishing such names and addresses purchaser will receive, without charge, another specifically designated product of the manufacturer.

(d) The additional product will be presented immediately upon completion by the purchaser of the names and addresses of the six prospective purchasers requested.

(e) Any representation or arrangement not contained in this disclosure shall not be binding upon the manufacturer or its distributor.

(f) No purchaser is required to participate in the program. Participation is strictly voluntary on the part of the purchaser.

[34 FR 13272, Aug. 15, 1969]

§ 15.363 Pricing of replacement glass for automobiles.

(a) The Commission issued an advisory opinion with respect to the pricing system of a dealer in replacement glass for automobiles.

(b) The dealer would grant discounts from the list price of automobile window glass to all customers. If an individual purchases a window, he would receive a discount of 20 percent from list price. If an insurance company sends the individual in, the discount would be 30 percent. (In this case, the bill would be sent to the insurance company and the individual.) If an automobile garage purchases the glass, the discount would be 50 percent. All sales are made within one State.

(c) The Commission expressed the view that implementation of the proposal in the manner described and under the circumstances stated probably would not violate any law administered by the Commission.

[34 FR 13273, Aug. 15, 1969]

§ 15.364 Origin disclosure of imported thread guides.

(a) The Commission issued an advisory opinion relative to the disclosure of the forign origin of imported ceramic textile and thread guides.

(b) The Commission understood that the guides are the size of a dime and that it is difficult, if not impossible to mark the country of origin on each guide during production. Markings after production is completed would be very difficult and very expensive. The guides are not sold to the general public, but are used in industry for the manufacture of other products.

(c) The Commission expressed the view that conspicuously marking on the package or container in which the guides would be shipped to their ultimate user the words "Made in [name of country] exclusively for [name of importer]" would be an adequate disclosure of the country of origin provided the guides were made exclusively for the applicant.

[34 FR 13988, Sept. 3, 1969]

§ 15.365 Request denied for approval to sell dairy company to any dairy company under Commission order.

(a) The Commission rendered an advisory opinion denying a request of a medium-sized dairy company for blanket approval to sell to any company under a Commission order.

(b) The company was the largest independent dairy company in its large marketing area, had the largest sales volume of dairy products in the area, had sales in excess of $5 million, was profitable, no other hardships were demonstrated, and efforts to sell to companies not under order had not been adequately explored.

(c) The Commission advised that it cannot give blanket approval to sell the company in question to any company under Commission order. It further advised that the denial of such request is without prejudice to the submission to the Commission by any company under order of a request to purchase such dairy. In such event, any such submission will be duly considered by the Commission, and it will then decide upon the basis of the facts then presented.

[34 FR 13988, Sept. 3, 1969]

§ 15.366 Labeling of imported magnetic recording tape.

(a) The Commission issued an advisory opinion with respect to the labeling of imported magnetic recording tape.

(b) In commenting upon the proposed labels as submitted, the Commission expressed the view that: (1) The words indicating the foreign country of origin should appear on the front or principal display panel; (2) the term "recording tape" should be used as the specification of the identity of the commodity and that it should comprise a principal feature of the principal display panel; (3) in view of its understanding that recording tape is of uniform width, the length of the tape should be expressed in terms of feet followed in parentheses by a declaration of yards and common or decimal fractions of the yard, or in terms of feet followed in parentheses by a declaration of yards with any remainder in terms of feet and inches; and (4) the place of business of the manufacturer, packer, or distributor should include the street address, city, State, and ZIP code; however the street address may be omitted if it is shown in a current city directory or telephone directory.

(c) The Commission invited the applicant's attention to its regulations under section 4 of the Fair Packaging and Labeling Act for additional information.

[34 FR 13988, Sept. 3, 1969]

§ 15.367 [Reserved]

§ 15.368 Disclosure of origin of imported plastic vinegar bottles.

(a) The Commission had rendered an advisory opinion to a manufacturer of domestically-made vinegar that it would not be necessary to disclose the origin of its imported plastic vinegar bottles.

(b) In the absence of any affirmative representation that the imported plastic bottles are made in the United States, the Commission said that it will not be necessary to disclose the Canadian origin of the containers.

[34 FR 14467, Sept. 17, 1969]

§ 15.369 Disclosure of foreign origin required in mail order advertising.

(a) The Commission rendered an advisory opinion to an importer of women's panty hose that it would be necessary to make a clear and conspicuous disclosure of the foreign origin of the hose in all mail order promotional material.

(b) Under the factual situation presented to the Commission, the importer proposes to purchase the wearing apparel in West Germany for resale in the United States through the mail. The hose will be plainly marked with a "Made in Free West Germany" tab sewn into the back of the garment, and the same disclosure will also be made on a paper sticker attached to the front of each cellophane bag containing the hose.

(c) Concluding that a disclosure would be required, the Commission said: "The underlying reason for the disclosure requirement is that mail order purchasers do not have the opportunity to inspect the merchandise prior to the purchase thereof and be apprised of a material fact bearing upon their selection."

[34 FR 14517, Sept. 18, 1969]

§ 15.370 Origin of cashmere sweaters.

(a) The Commission advised an importer of cashmere sweaters that it would not be necessary, under section 5 of the FTC Act, to disclose they were knitted in Hong Kong or that the yarn was spun in Japan, in the absence of an affirmative representation that the sweaters are entirely of domestic origin.

(b) Under the factual situation presented to it, the sweaters will be knitted in Hong Kong from yarn which is spun in Japan. Thereafter, the sweaters will be shipped to a plant in the United States where they will be scoured, dyed, zippers added, steamed, and pressed.

[34 FR 14518, Sept. 18, 1969]

§ 15.371 Use of "12 karat gold filled" to describe earrings.

(a) The Commission issued an advisory opinion to a company, denying permission to apply the designation "12 karat gold filled" unqualifiedly to an earring where all the metallic parts, except the steel spring base, are composed of 1/20 12-karat-gold-filled precious metal.

(b) It was alleged by the company seeking the opinion that the spring base performed a "spring" or tension function and is a spring within the meaning of that word in trade practice rules for the Jewelry Industry. Being a spring, it was further contended, exempts it in any assay for quality and permits unqualified use of the designation "12 karat gold filled."

(c) In rejecting the company's position, the Commission said: "Even if we assume that the allegation of performing a spring or tension function is correct, this is not the primary purpose or function of the spring base. As we view the situation, the spring base serves primarily as a connecting link or arm between the clip, which is attached to the top, and the ornament which is attached to the bottom. Thus, simply because the spring base may perform a tension function, this does not mean that the component is a spring within the meaning of that word in Rule 22D of trade practice rules for the Jewelry Industry. Stated differently, performing a dual function does not necessarily make the component a spring. Accordingly, the Commission is of the opinion that the spring base is not a spring as that term is contemplated within the meaning of the rules and the component therefore is not exempt in assay for quality. Since the component is not a spring, it would therefore be improper under Rule 22B(4) and Rule 25(a) of the trade practice rules to unqualifiedly designate the earring as '12 karat gold filled'. As you know, these two rule provisions prohibit the use of a quality mark, such as the one contemplated, in a manner which would misrepresent the metallic composition of the product or any part thereof. Since the spring base is composed of steel rather than the quality indicated in the proposed designation, it would therefore be deceptive to use such a quality mark unqualifiedly."

[34 FR 15643, Oct. 9, 1969]

§ 15.372 Use of "Made in U.S.A." label.

(a) The Commission rendered an advisory opinion to a manufacturer of optical lens systems in regard to the labeling of its products as "Made in U.S.A."

(b) Specifically, the company wanted to know what percentage of imported components a product could contain and still be properly labeled as "Made in U.S.A."

(c) In the advisory opinion which was rendered, the Commission stated that it would construe a "Made in U.S.A." mark as an affirmative representation that the product is entirely of domestic origin. Concluding its opinion, the Commission said that it would be improper to use such a mark where the finished product contains imported components without clearly disclosing the foreign country of origin of the imported parts.

[34 FR 15792, Oct. 14, 1969]

§ 15.373 Trade association code of conduct found unobjectionable.

(a) The Commission advised a trade association of shippers' agents that the aims of its proposed Code of Conduct appear unobjectionable and that adherence by members to its provisions should not operate to effect any unreasonable restraints of trade so long as it is implemented in a fair and nondiscriminatory manner.

(b) A "shippers' agent", as defined in the Interstate Commerce Act (49 U.S.C.A. 1002(c)(2)) and the proposed Code, is one whose operation consists solely of "consolidating or distributing pool care, [and] whose services and responsibilities to shippers in connection with such operations are confined to the terminal area in which such operations are performed." Under this provision of law a shippers' agent's responsibility is confined to the consolidation of freight for proper shipment. He does not "break bulk" nor is he responsible for the ultimate distribution of freight. Were he to engage in this latter activity he would, by definition, no longer be a shippers' agent eligible for association membership. According to the requesting party the Code is intended primarily as a preventive measure to assure that members will conduct their business operations within the Act's limitations.

(c) One provision of the code requires that members indicate, in advertising and elsewhere, that their services and responsibilities to shippers are confined to the terminal area in which they operate. This follows the limitation of the Act and if adhered to by members, will serve to truthfully inform shipper-customers concerning this status.

(d) Another provision requires that a member shall avoid any action or statement which could be construed as imputing to him a common carrier status or a status other than that embodied in the Act. This assures that members do not falsely imply to shippers that they take a greater responsibility for the shipment and distribution of freight than is permitted by their status under the Act.

(e) Other provisions provide in general terms that the members conduct shall be characterized by "candor and fairness" in their relationships among themselves and with the public, and that they shall properly discharge their obligations and duties to the shippers who employ them.

(f) It is a condition to membership in the Association that a shippers' agent agrees to subscribe to and abide by the Code. Repeated failure to discharge his obligations thereunder will, upon notice and a probationary period, constitute cause for expulsion of an offending member by the Board of Directors of the Association. Such expelled member may, however, exercise his right of appeal before the full membership

(g) While the Code contains provisions restricting the business operations of members, it appears from the materials submitted that the purpose of these restrictions is to insure that members remain within the Act's limitations and respect the confidential agency status created in their dealings with shipper-customers. The purpose is also to encourage Association members voluntarily to refrain from unfair or deceptive practices. In this context there is a greater public interest in protecting shippers from dishonest shippers' agents than there is in condemning the minimal restraints that might result from application of the Code.

(h) Undoubtedly, unreasonable and therefore unlawful restraints might result if an Association member is arbitrarily or improperly expelled from membership, but the Commission believes that there is ample public interest in effectively encouraging Association members to refrain from the clearly pernicious practices condemned by the Code. On the assumption that the Code will be administered in such a way as to promote this end, and not so as to place unreasonable restraint on the ability of members to do business, the provision permitting the Association to expel nonconforming members is approved.

(i) The Commission also noted that it had confined itself in its opinion to so much of the request as falls within its jurisdiction. The extent, if any, to which another governmental agency may be concerned with the Association's activity is a matter to be determined by reference to that agency.

[34 FR 15792, Oct. 14, 1969]

§ 15.374 Tripartite promotional plan for larger supermarkets.

(a) The Commission issued an advisory opinion concerning a proposed tripartite promotional plan for larger supermarkets.

(b) The applicant proposed to solicit advertising from packagers of goods which are normally stocked in grocery stores. The applicant would arrange for the display of such advertising in its projector using a color sound film cartridge which would be installed in supermarkets that record an average of 7,500 transactions per week or have an annual sales volume in excess of $1 million. Consideration to participating retailers for the permission to install the projector units would be one of the three commercial spots on each film cartridge provided while the units are in their stores.

(c) The Commission expressed the view that implementation of the proposed course of action in the manner described probably would violate the Clayton Act, section 2(d) or 2(e), as amended, and/or the Federal Trade Commission Act, section 5 for the reason that the proposed payment or services would be made available only to the larger supermarkets. See Guide 7 of the Commission's Guide for Advertising Allowances and Other Merchandising Payments and Services (May 29, 1969). The proposed plan makes no provision for retailers for whom the basic plan is not usable and suitable. (See Guide 9.) The plan makes inadequate provision for informing competing customers of the availability of the program. (See Guide 8.)

[34 FR 17265, Oct. 24, 1969]

§ 15.375 "Made in U.S.A." label on clock-radios containing an imported component.

(a) The Commission rendered an advisory opinion to a manufacturer of clock-radios which are partly domestic and partly of Japanese origin, and which the manufacturer wishes to label as "Made in U.S.A."

(b) The finished product, except for the radio chassis which is of Japanese origin, will be manufactured and assembled in the United States. Although the imported chassis will be marked with the country of origin at the time of importation, the mark will not be visible to prospective purchasers after the imported part is assembled into the finished product. The imported chassis will cost approximately $2 or 29 percent of total production cost, with the remaining 71 percent being of domestic parts and labor.

(c) Concluding that such a product could not be unqualifiedly marked as "Made in U.S.A.", the Commission said: "* * * it would be improper to use the 'Made in U.S.A.' mark on the clock-radios without clearly disclosing the foreign country of origin of the imported radio chassis."

[34 FR 17329, Oct. 25, 1969]

§ 15.376 Disclosure of foreign labor services performed on domestically produced textile fiber products.

(a) The Commission advised a manufacturer of textile fiber products it would not be necessary to disclose that certain stitching and assembly operations were performed in Tijuana, Mexico, on domestically produced sportswear.

(b) The manufacturer will cut and otherwise prepare American-made fabrics together with such findings as buttons, zippers, and threads which will be sent to a contract factory in Mexico for stitching and other assembly operations. The units will be then returned to the manufacturer's production facilities where final manufacturing procedures will occur. The manufacturer's foreign labor costs will represent between 15 percent and 20 percent of total production costs.

(c) The manufacturer was advised by the Commission that it would not be necessary to disclose in the labeling the nature and extent of the foreign operations performed on the garments in Mexico under the laws it is empowered to enforce.

[34 FR 17329, Oct. 25, 1969]

§ 15.377 Device for creasing cigarettes.

(a) The Commission rendered an advisory opinion in regard to the advertising claims to be made for a device which allegedly provides the "answer to safer smoking".

(b) Specifically, the manufacturer requested an advisory opinion in regard to the legality of the following proposed advertising:

(c) "The (name of device) is a revolutionary invention that provides the answer to safer smoking. It reduces gases as well as tar and nicotine. The device prevents formation of high temperature gases in cigarettes, thereby reducing the hazards of smoking. You can use the (name of device) on any popular brand of cigarette, including filter cigarettes. Independent laboratory tests substantiate the claim that the (name of device) significantly reduces tar, nicotine, and gases in the popular brands of cigarettes. The (name of device) re-engineers your cigarette to give a less harmful smoke. In addition, unsolicited testimonials state that the smoker enjoys a cooler and more flavorful cigarette, reduces smoker's cough and avoids harsh bite found in many brands of cigarettes."

(d) In the advisory opinion which was rendered to the requesting party, the Commission said:

(e) "The Commission has carefully considered your request along with the laboratory reports and other material submitted in connection therewith and has concluded that the data do not support the claims made in the proposed advertising. The conclusions offered on the basis of the laboratory tests cannot be accepted because such tests do not provide statistically valid data from which tar and nicotine reduction claims may be justifiably made. Nor do the tests otherwise conform to the Commission's standards for cigarette testing described in the Commission's press release issued August 1, 1967. Moreover, tests by the Commission's Cigarette Testing Laboratory indicated that there are no statistically significant reductions in the tar or nicotine content of cigarettes decreased by means of the device.

(f) "In addition to the methodological infirmities of the submitted data, the Commission also notes that none of the reports submitted shows that the alleged reductions of tar, nicotine, and benzopyrene content result in a decrease in the incidence of cancer, coronary heart disease, bronchitis, pulmonary emphysema, or other diseases associated with cigarette smoking. Nor do the tests otherwise establish that the claimed reductions of tar, nicotine, or benzopyrene content obtained by means of your device significantly reduce the health hazards of smoking. In short, there appears to be no substantial scientific evidence in support of the claim that the device 'provides the answer to safer smoking'."

[34 FR 17329, Oct. 25, 1969]

§ 15.378 Savings claims based upon comparison with comparable merchandise.

(a) A manufacturer of combination color television, radio, and phonograph sets requested an opinion from the Commission in regard to the legality of savings claims based upon the sale of comparable merchandise.

(b) Specifically, the manufacturer wanted an opinion in regard to the legality of the alleged savings claim of $300. The manufacturer also wanted to know whether he should identify the three specific competitive manufacturers with which the comparison was being made, or should they be identified merely by referring to them as brand A, B, and C.

(c) In response to the first question the Commission said that because it did not have the facts upon which to base a judgment, it cannot pass upon the legality of the alleged savings claim of $300. The Commission noted that it has laid down rather definitive guidelines for those who wish to utilize savings claims in their advertising which are based upon the sale of comparable merchandise. The Commission directed the manufacturer's attention to Guide 2 of the Guides Against Deceptive Pricing and noted that advertising meeting the requirements outlined in Guide 2 would not be objected to by the Commission. Commenting further upon this question, the Commission said:

> Basically, Guide 2 outlines two fundamental requirements for determining the validity of savings claims based upon the sale of comparable merchandise. First, the other merchandise must be of essentially similar quality in all material respects to the adver-

tiser's product. Second, the advertiser should be reasonably certain that the price advertised as being the price of comparable merchandise does not exceed the price at which such merchandise is being offered by representative retail outlets in the area.

(d) In regard to the second question, the Commission said that it could express no opinion as to whether the manufacturer should identify the three specific competing manufacturers by name or merely identify them by referring to Brand A, B, and C. Its primary concern here, the Commission added, is to make certain that the advertising clearly discloses the basis for the comparison and that the statement is factually true.

[34 FR 17385, Oct. 28, 1969]

§ 15.379 [Reserved]

§ 15.380 Use of order cards in packages of merchandise or in direct mailing material.

(a) The Commission issued an advisory opinion with respect to the insertion of order cards in packages of merchandise or in direct mailings of advertising material.

(b) The applicant, a distributor of various office supplies and general merchandise proposed to enclose an order card in the packages prepared for shipment of merchandise to customers, suggesting that they place these cards in the Key-Operator's manual. Also occasionally the cards would be included with some direct-mail literature sent to prospective customers.

(c) The Commission expressed the view that it would not initiate action against the applicant were the proposed course of action implemented in the manner described.

[34 FR 17386, Oct. 28, 1969]

§ 15.381 Disclosure of origin of imported ignition coil parts.

(a) Manufacturers of automotive ignition coils sold as replacement parts were advised it would not be necessary to disclose the Japanese origin of the coil windings used in the production of such products.

(b) In the factual situation involved, the imported coil windings will cost about 84 cents each which represents approximately 45 percent of total production costs. The remaining parts, such as the voltage terminal insulating tower, etc., and labor will be of domestic origin and will cost about $1.04, representing approximately 55 percent of total production costs.

(c) Advising that the country of origin disclosure would not be required under these circumstances, the Commission said: "In the absence of any affirmative representation that the automotive ignition coils are made in their entirety in the United States, or any other representation that might mislead purchasers as to the country of origin, the Commission is of the opinion that, under the facts as presented, the failure to mark the origin of the imported coil windings will not be regarded by the Commission as deceptive."

[34 FR 17386, Oct. 28, 1969]

§ 15.382 Franchise agreement with fair trade price schedule.

(a) The Commission issued an advisory opinion with respect to a franchise agreement in the recreational equipment industry.

(b) A significant provision of the proposed agreement related to Fair Trade Prices. A schedule of Fair Trade Prices was to be attached to and made a part of the agreement and the dealer must agree that he will not advertise, offer for sale, or sell any products at less than the fair trade prices, nor make any refunds, discounts, allowances, or concessions which will have the effect of decreasing those prices, nor offer any of the fair traded items in combination with other merchandise at a single, combination or joint price. The agreement further provided that this provision should be applicable only in those States where agreements of this character are lawful.

(c) The Commission advised that in view of the McGuire Act amendment to section 5 of the Federal Trade Commission Act it could see no objection to inclusion of the provision in the agreement as long as the seller does not fix dealer prices outside of fair trade States.

(d) The Commission further advised that, subject to the caveat above stated, it would not initiate action were the proposed course of action implemented in the manner described.

[34 FR 17386, Oct. 28, 1969]

§ 15.383 Labeling of leather gloves partly domestic and partly of foreign origin.

(a) The Commission advised a manufacturer of industrial work gloves, which are partly domestic and partly of foreign origin, that it could not use representations which implied that the gloves were entirely of domestic origin. Specifically, permission was requested to use one of the following three representations on the plastic containers of the gloves:

Made from American Split Cowhide
Made from American Split Leather
American Leather Exclusively Used

(b) According to the Commission's understanding of the facts, the company purchases semiprocessed split cowhide leather in American which is shipped to Taiwan where it is further processed, cut, and sewn into industrial work gloves. Foreign production costs represent approximately 37½ percent of the finished gloves, with the remaining 62½ percent representing the cost of the American-made leather. One dozen gloves will be packaged in each plastic container and each pair of gloves will be labeled as having been "Made in Taiwan". However, this label will appear on the inside wrist of the gloves and will not be seen through the plastic container. Moreover, the container will not be opened until the sale has been consummated.

(c) The Commission said that it would not object to the use of the first two representations, provided they were qualified by a disclosure of equal prominence indicating the gloves were made in Taiwan. As qualified, the two representations would read:

Made in Taiwan from American Split Cowhide
Made in Taiwan from American Split Leather

(d) Without the qualification, the Commission believes that a substantial number of prospective purchasers would misinterpret the two proposed statements to mean that the gloves were made in America from American-made split cowhide.

(e) Similar qualification would be required to the third proposed representation. In addition, it would also be necessary to qualify the word "leather" because that word standing alone means top grain leather. Since the leather in question is not top grain but split, it would be deceptive to make unqualified use of the word "leather" under these circumstances. Therefore, the Commission concluded that it would not object to the use of the third representation if it were revised to read as follows:

Made in Taiwan—American Split Leather Exclusively Used.

[34 FR 17386, Oct. 28, 1969]

§ 15.384 Special discount package price to new dealers.

(a) The Commission issued an advisory opinion with respect to a proposed special discount package price to new dealers in the building materials industry.

(b) The applicant proposed to offer to new retail dealers a special discount package on certain building materials plus an in-store display. In addition to the in-store display facility the new dealer would be offered a price approximately one-third below the price at which the merchandise is offered to existing dealers. The proposal would be a one-time promotion.

(c) The Commission expressed the opinion that "it is unlikely that injury could result from this one shot offer in view of its nature and the start up costs which new dealers are apt to experience." Therefore, the Commission would not object to the plan if implemented as described in paragraph (b) of this section.

[34 FR 17622, Oct. 31, 1969, as amended at 34 FR 19800, Dec. 18, 1969]

§ 15.385 Disclosure of origin of imported locks.

(a) The Commission advised concerning locks imported from England and Italy that it would be necessary to make a clear and conspicuous disclosure of the foreign country of origin on the locks. If the locks are displayed at the point of sale in a container so that the disclosure of origin is not likely to be seen, it would also be necessary to make the same disclosure of foreign origin on the containers in which they are packaged.

(b) Under the facts involved in the ruling, the locks will be used for both residential and commercial purposes and some of them could be marketed under the trade name of a domestic company, which contains the name of a well-known American city.

[34 FR 18243, Nov. 14, 1969]

§ 15.386 Origin of imported brush for hair roller.

(a) The Commission issued an advisory opinion with regard to the question of whether it is necessary to disclose the origin of the imported brush which is assembled with American made components to form a brush hair roller.

(b) It is proposed to produce a hair roller in the United States. The roller consists of three components: spiral spring, netting, and brush insert. The brush insert is manufactured in a foreign country. The spiral spring and netting are manufactured in the United States. All assembling is done in the United States. The cost of the brush accounts for less than 25 percent of the total cost of the hair roller as marketed. The question involved is whether the foreign origin of the brush must be marked on the printed card which will be used in packaging the roller.

§ 15.387 [Reserved]

§ 15.388 "Bonus" portable typewriter offer.

(a) The Commission issued an advisory opinion relative to proposed advertising of "bonus" typewriters. The proposed advertisement would offer a portable typewriter as a "bonus" to any one accepted for enrollment in a correspondence course. Readers were invited "to write for information," but the prerequisites to the receipt of the "bonus" typewriter were not disclosed.

(b) The Commission advised that it "* * * is of the view that the advertisement in the circumstances described would be misleading and deceptive and in possible violation of section 5 of the Federal Trade Commission Act in several respects. For one thing, the "bonus" offer is to be a continuing offer, which means that the regular price for the training course of $595 includes the typewriter; the typewriter would not, therefore, be a "bonus". Also, the proposed advertisement does not make clear that what is being sold for a fee is a training course in motel management and that the so-called "bonus" typewriter is offered only in connection with such course.

(c) "Moreover, even were the typewriter to be given as a true bonus, as, for example, if a time-limited offer was made without a change in tuition, the proposed advertisement would still be deceptive and misleading because the terms and conditions for the receipt of the typewriter are not disclosed, including, it appears, an advance payment of $595 tuition for a motel training course.

(d) "Furthermore, the proposed advertisement is deceptive because, taken as a whole, it tends to convey the impression that service is not being sold but, rather, that a gift is to be given to specially qualified persons who are willing to consider a career in motel management."

[34 FR 18353, Nov. 18, 1969]

§ 15.389 Disclosure of foreign assembly operations on ladies' blouses.

(a) The Commission advised that it would not be necessary to disclose the foreign country of origin where certain assembly operations are performed on ladies' blouses.

(b) Under the factual situation involved in the ruling, the synthetic fabric, buttons and thread will all be of domestic origin. The fabric will be cut in the United States and thereafter shipped to Trinidad where it will be assembled. Assembly operations in Trinidad will consist of sewing, pressing, and trimming. Approximately 26.4 percent of total production costs will be of foreign origin, with the remaining 73.6 percent representing domestic costs.

(c) Concluding that a disclosure would not be required under section 4(b)(4) of the Textile Fiber Products

Identification Act of section 5 of the FTC Act, the Commission said: "In the absence of any affirmative representation that the finished product is made entirely in the United States, the Commission has concluded that it will not be necessary to disclose the nature and extent of the foreign operations performed on the ladies' blouses."

[34 FR 18353, Nov. 18, 1969]

§ 15.390 Offer of incentive bonus to customers.

(a) The Commission advised that to offer an incentive bonus to open credit account customers to encourage the payment of invoices within established terms and conditions of sale would not be objectionable.

(b) Most sales are made to open credit account purchasers of plumbing supplies and it was proposed to offer all such customers, as well as all new accounts, a bonus of 1 percent based on the aggregate total of monthly purchases to be given in the form of a credit certificate. This certificate will be honored by a selected local travel agency to apply toward vacation travel, and to be issued to those who adhere to established credit terms. Customers will present their certificates to the travel agency as partial or complete payment of their vacation expenses within 18 months from date of issuance.

(c) The Commission expressed the view that the proposed program, as stated, should be considered as a proposal to increase established credit terms and conditions of sale by 1 percent and as such the program probably would not be unlawful except to the extent, if any, the additional discount may effect unlawful price discriminations within the meaning of section 2(a), amended Clayton Act. However, because the program will be offered and made available to all open credit account customers and because the single qualifying requirement is adherence to established credit terms and conditions of sale it is not likely that implementation of proposed program would result in any adverse competitive effects.

(d) The Commission advised it would initiate no proceedings so long as the proposed program is implemented in the manner and for the purpose intended.

[34 FR 19072, Dec. 1, 1969]

§ 15.391 Labeling of products composed of ground leather and fabric.

(a) The Commission is of the opinion that a product which consists of reconstituted leather applied to a fabric base may not be described as "leather" without proper qualification and may not be described as "genuine milled leather."

(b) This product may not be described as "leather" unless the word is accompanied by a clear statement as to the product's true composition. The term "leather" used alone means top grain leather and the product referred to, composed of ground leather on a fabric backing, does not come within such a definition. The use of the unqualified term "leather" to describe such product would tend to deceive prospective customers and possibly violate section 5 of the Federal Trade Commission Act.

(c) The product may not be described as "genuine milled leather" with or without qualification. It is not clear what is intended by the word "milled" but the phrase as a whole suggests top grain leather in a manner which would make any attempted qualification a contradiction in terms. Use of this phrase would tend to mislead and deceive prospective customers as to the true composition of the product and might violate the Federal Trade Commission Act.

(d) The close resemblance of the product to leather may tend to mislead prospective purchasers into the belief that the product is top grain leather. Accordingly, the product should be labeled to indicate its true composition or, optionally, that it is imitation or simulated leather or nonleather.

(e) Finally, the backing of the product appears to be a textile fiber product subject to the Textile Fiber Products Identification Act, and, accordingly, certain information must be disclosed as to the composition of such fabric.

(f) The product may be described appropriately in a number of ways, among which are the following:

Ground leather laminated to fabric (60 percent polyester, 40 percent rayon).
Shredded leather laminated to fabric (60 percent polyester, 40 percent rayon).
Pulverized leather laminated to fabric (60 percent polyester, 40 percent rayon).
Imitation leather laminated to fabric (60 percent polyester, 40 percent rayon).
Simulated leather laminated to fabric (60 percent polyester, 40 percent rayon).
Nonleather. Fabric backing 60 percent polyester, 40 percent rayon.

[34 FR 19072, Dec. 1, 1969]

§ 15.392 Disclosure of origin of partly foreign-made foundation garments.

(a) The Commission expressed an opinion that it would not be necessary to disclose the name of the foreign country where certain finishing operations are performed on ladies' foundation garments.

(b) The fabric, which is of domestic origin, will be cut to shape in the United States and shipped to Mexico where it will be sewn and finished. The foreign labor costs of producing the finished garment will represent approximately 20 percent of total production costs.

(c) The Commission is of the opinion that it will not be necessary to disclose in the labeling the nature and extent of the foreign operations performed on the foundation garments, either under section 5 of the Federal Trade Commission Act or section 4(b)(4) of the Textile Fiber Products Identification Act. The Commission noted, however, that inquiry should be made of the Bureau of Customs as to any marking requirements under section 304 of the Tariff Act of 1930.

[34 FR 19072, Dec. 1, 1969]

§ 15.393 Request for reconsideration of Advisory Opinion 333 (§ 15.333) pertaining to wholesaler-manufacturer relationship; freight saving as cost justification.

(a) The Commission was requested to reconsider the advice given in Advisory Opinion Digest No. 333 (§ 15.333) concerning manufacturers' selling relationships with wholesalers. The Commission also considered the question of passing along freight savings to customers.

(b) After concluding that it would adhere to the advice given in the earlier Advisory Opinion the Commission noted that the issue of potential price discrimination between competing wholesalers, some receiving 40 percent and others 25 percent discounts off list prices, no longer existed since only one discount rate is now involved.

(c) Negative advice was given in connection with the following three factual situations because, in the Commission's opinion, applicable antitrust law prohibits suppliers from taking certain punitive action against wholesalers with whom they have been dealing:

(1) A manufacturer refuses to deal further with a wholesaler who has changed his method of doing business and has undertaken to franchise subjobbers whom he prohibits from buying directly from the manufacturer and requires that they purchase all the manufacturer's products through the wholesaler.

(2) A manufacturer discontinues sales to a wholesaler who ceases to maintain salesmen at all times who regularly call upon beauty salons and advise licensed professional hairdressers "on the safe and proper methods of applying the manufacturer's products and who keep sufficient supplies" on hand for current needs of their beauty salon customers.

(3) A manufacturer refuses to deal further with a wholesaler who, without the manufacturer's authorization, resells to independent subjobbers and other wholesalers.

(d) With respect to the problem of cost justification the Commission advised that applicable provisions of section 2(a) of the amended Clayton Act permit a supplier to pass along freight savings to customers but only to the extent of such savings and only if available to all customers competing in the resale of his products.

[34 FR 20333, Dec. 30, 1969]

§ 15.394 Approval for merger of privately owned tufting machinery and equipment manufacturers.

(a) The Federal Trade Commission granted clearance to privately owned manufacturers of carpet tufting machinery and related equipment to merge their operations into one corporation whose voting stock will be offered for sale to the general public.

(b) The merging companies manufacture machinery and related equipment used by textile mill operators in the production of rugs, carpets, and other textiles. Some of the companies have a common ownership and are competitors; another is not a competitor but manufactures machinery used by customers of the others. Some have about the same market shares in an industry of five manufacturers, about one-fifth of the market share of the dominant company, a substantial national conglomerate enterprise. One firm to be merged competes with ten others in its related industry.

(c) After having considered all available information the Commission concluded that the effect of the proposed merger is not likely to result in any lessening of competition nor the creation of a monopoly in the manufacturing of tufting machinery and equipment. The Commission is of the opinion that the beneficial competitive effects flowing from the amalgam of the privately owned enterprises into a publicly owned corporation will be to give greater competition to its giant rival.

[34 FR 20333, Dec. 30, 1969]

§ 15.395 Retailer price reporting plan.

(a) The Commission issued an advisory opinion governing a proposed price checking service designed to publicize various current retail prices for grocery store products. Underlying data would be obtained in part by direct observation of posted prices and in part by reference to information supplied by wholesalers and retailers. The service would be available, for a fee, to anyone interested.

(b) In the Commission's view, exchange of price data may lend itself to price fixing and may result in the elimination of price competition and the legality of the proposed course of action would depend on its implementation.

[34 FR 20333, Dec. 30, 1969]

§ 15.396 Use of term "Peat Moss-Pifine and Sedge".

(a) The Commission rendered an advisory opinion concerning a proposal to describe peat with the following terminology:

——— Peat Moss Pifine and Sedge

(b) The product is composed of at least 75 percent peat by weight, with the remaining 25 percent comprised of such soil substances as are commonly intermixed with peat as found in its natural state. It is derived from three nonmoss substances; namely, Pifine (Paille Finne), or commonly referred to as maiden cane grass, cut grass, and saw grass, Pifine comprises the bulk of the plant residue present in the product.

(c) Three provisions of the Commission's Trade Practice Rules for the Peat Industry govern the use of the term "Peat Moss" in this particular situation. First, there is the definition of the word "peat," which is as follows:

"Peat". Any partly decomposed vegetable matter "which is accumulated under water or in a water-saturated environment through decomposition of mosses, sedges, reeds, tule, trees, or other plants."

(d) The second pertinent provision is Rule 2, which prohibits use of the word "Peat" to describe any product "which is not in fact composed predominantly of peat to the extent that at least 75 percent (by weight) of the product is composed of peat, with such other materials as may be present in the content, and constituting the remaining percentage, being comprised of such soil substances as are customarily intermixed with peat as found in its natural state."

(e) Third, Rule 3 covers use of the terms "Moss Peat" and "Peat Moss", and has been codified under § 185.3[1] of this Title 16.

(f) On the basis of the foregoing facts, the Commission expressed the opinion that the proposed terminology complies with the requirements of Rule 3(b) of the Trade Practice Rules for the "Peat Industry". However, the opinion also noted that some of the art work used the words "Peat Moss" without qualification or without conspicuous qualification. Such a representation, the Commission said, would not be in compliance with Rule 3(b). Concluding its opinion, the Commission said: "It is necessary under the pertinent rule * * * to disclose the kinds of peat of which (the) product is composed i.e., Pifine and Sedge, and that such disclosure be of equal size and conspicuousness and be placed in immediate conjunction with the words 'Peat Moss' whenever they are used in labeling or advertising. If the proposed terminology is used in such manner, the Commission would interpose no objection thereto."

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[1] 16 CFR Part 185 was deleted at 42 FR 12171, Mar. 3, 1977.

[34 FR 20334, Dec. 30, 1969]

§ 15.397 Origin of dresses partly made in United States and Haiti.

(a) The Commission rendered an advisory opinion in regard to the proper marking of dresses partly made in the United States, Puerto Rico, and Haiti.

(b) The fabric will be of American origin representing 73 percent of total production costs; cutting and sorting in Puerto Rico—8 percent of production costs; sewing in Haiti—8 percent of production costs; hem sewing, ironing, final checking and sorting, packing and attaching hand tags in the United States—11 percent of production costs.

(c) The question considered involved which of the following three labels must be applied to the dresses:

(1) "Made in U.S.A."

(2) "Made in Haiti."

(3) "Made in Haiti with U.S. component parts."

(d) The first claim constitutes an affirmative representation that the product is made in its entirety in the United States. Since a substantial portion of the manufacturing process on the dresses is performed in Haiti, it would be improper to use the "Made in U.S.A." claim without clearly disclosing that the dresses are sewn in Haiti.

(e) Similarly, a "Made in Haiti" claim would be misleading because the dresses are not made in their entirety in that particular country.

(f) Except for the word "made", the third proposed claim would be unobjectionable. There are two principal steps in the manufacturing process of dresses; namely, cutting and sewing. Since approximately one-half of the manufacturing process (the cutting) takes place in another country, a more accurate description of what is being done in Haiti would be to substitute the word "sewn" for the word "made." Thus, the claim as revised would read: "Sewn in Haiti with U.S. component parts".

(g) Although not specifically asked, the Commission further advised that in the absence of any affirmative representation that the dresses are entirely of United States' origin, it will not be necessary to disclose the fact that the dresses are sewn in Haiti. Finally, that this opinion does not relieve anyone from complying with all applicable rules and regulations of the Bureau of Customs.

[35 FR 418, Jan. 13, 1970]

§ 15.398 Advertising of hamburgers made of chuck and plate.

The Commission issued an advisory opinion relative to advertising of hamburger patties consisting of 85 percent chuck and 15 percent plate. The Commission advised that the use of the phrase "* * *'s Hamburgers are made with ground chuck" in advertising would be violative of section 12, Federal Trade Commission Act.

[35 FR 418, Jan. 13, 1970]

§ 15.399 Plan for merchandising by lottery.

(a) The Commission issued an advisory opinion relative to proposed weekly drawings for wigs.

(b) The wigs are purchased at $5 each wholesale and retailed to consumers at $50. None have ever been sold at retail below this price. It is proposed to establish a method by which each buyer of a wig would be assured of a wig at a price of $50 or less. The method of operation would be as follows: Customers would be divided into groups of 10. Each week, each such customer in each such group would pay $5, and a drawing would be had, the winner to receive a wig. The next week, the nine remaining persons in the group of 10 would each pay $5, and one of them would receive a wig. This process would continue, until finally the last person in the group would pay the full price of $50 for the wig.

(c) The Commission expressed the view that the proposed course of action would constitute a scheme to sell merchandise by means of a lottery or game of chance, a sales device long held to be illegal under the Federal Trade Commission Act, section 5. The mere fact that each participant receives a thing of value for his contribution does not negate the existence of a lottery nor change the plan's essential nature as an appeal to the public's gambling instincts. Clearly, the participants in this drawing would be motivated by the chance of receiving something of more value than the amount they contributed. Hence, the nature of the appeal is unmistakable.

[35 FR 418, Jan. 13, 1970]

§ 15.400 Labeling of imported magnetic recording tape.

(a) Modifying the position announced in Advisory Opinion Digest No. 366 (§ 15.366), the Commission advised that:

(1) Tape accompanying an imported tape recorder, if packaged to show country of origin, is not required to express quantity of contents as described in Advisory Opinion Digest No. 366 (§ 15.366), provided the description of contents does not constitute an unfair or deceptive practice which would violate the Federal Trade Commission Act.

(2) Cartridge tapes may be expressed in terms of playing time in lieu of a linear measurement.

(3) Imported packaged magnetic recording tapes may continue to be distributed provided the country of origin is appropriately shown.

(b) This action was taken to conform the opinion with the Commission's Statement of General Policy and Interpretation, § 503.2 of this chapter.

[35 FR 2655, Feb. 6, 1970]

§ 15.401 Designation of landscaping material by volume on containers.

(a) In a previous advisory opinion the Commission advised that to designate the contents on containers of landscaping material by cubic measurement rather than by weight would be objectionable under section 5, Federal Trade Commission Act.

(b) The proposal considered involved the marketing of a processed clay material in physical form varying from pieces of approximately 2 inches down to 1/10 of an inch in diameter for use as a landscaping material, particularly around shrubs, trees, walkways and other non-grassed areas. Because the density of the product by volume is less and the area of coverage by weight greater than competing materials used for the same purpose it was represented that it would be more beneficial and informative to consumers to stipulate the container contents in cubic measurement instead of by the traditional contents by weight designation. Specifically, the Commission was asked:

(1) May the product be marketed by showing the contents of the bags in which it is contained by way of cubic measurement and not by weight, leaving off all reference to weight?

(2) Also, may the area the material will cover in square inches, feet, or yards to a specified depth be shown on the bags?

(c) The Commission expressed the view that the product, being used mainly for ground covering purposes, is classified as a type of lawn and garden commodity and as such is not considered a "consumer commodity" as defined by the Fair Packaging and Labeling Act. Whether the proposed labeling would be an unfair or deceptive act must, therefore, be tested against the criteria of section 5, FTC Act. Controlling in matters of this nature is whether the proposed course of action is fair to consumers according to recognized principles, not that it might be unfair according to tradition and the morals of the market place. The concept of "Unfair or deceptive acts or practices" stresses business integrity, encourages legitimate trading, and protects consumers against commercial spoliation.

(d) The Commission expressed the view that it would be more beneficial and informative to consumers if the contents were designated on the product containers by both weight and volume. Although not essential, it would also be beneficial and informative to consumers if the extent of area coverage to a predetermined depth by weight and by volume were included in such content designation.

(e) The Commission further advised that its opinion is confined to so much of the request as falls within its jurisdiction and the extent, if any, to which another governmental agency, either local, State, or Federal, may be concerned is a matter to be determined by reference to that agency.

[35 FR 2655, Feb. 6, 1970]

§ 15.402 Marking of shoe soles composed of ground leather.

(a) The Commission issued an advisory opinion in regard to the proper marking of a material to be used in the manufacture of shoe soles.

(b) The material in question is not leather but a man-made fibrous leather material bonded with an adhesive. It will be manufactured and sold in its natural form to manufacturers for use as shoe soles and/or heels. Shoe manufacturers will in all probability dye or stain the material so as to give it the appearance of leather or any other material as desired. Under no circumstances will the manufacturer of the material have any control over its appearance once it has been sold to shoe manufacturers.

(c) Specifically, the following questions were raised in regard to the proper marking of the material:

(1) When the material is used for shoe soles and/or heels but does not have the appearance of natural leather, need there be any marking or labeling whatsoever?

(2) In those instances where the material is used for shoe soles and/or heels and does have the appearance of natural leather, is it necessary to mark or label the material with a designation indicating that it is not natural leather?

(3) In all cases where the answer to question 2 is in the affirmative and assuming that the material is easily visible, is it sufficient to mark the shoe part made from this material with its trade name?

(4) If the answer to question 3 is in the negative, what would constitute adequate and sufficient disclosure of the nature of the material?

(d) In regard to the first question where a manufacturer products a leather-type product for use in shoes and knows or has reason to believe that after processing it will look like leather, the manufacturer must label the product as indicated in question 2.

(e) Second, when the material is used for shoe soles and does have the appearance of leather, it is necessary for the shoe manufacturers to mark or label such materials with a designation which clearly discloses either: (1) The material is simulated or imitation leather, or (2) the general nature of the material in such manner as to show it is not leather or split leather. This requirement is imposed by Guide II of the Shoe Guides, but it should be noted that heels are specifically exempted from the marking provisions thereof.

(f) Third, marking the shoe soles with the trade name would not be sufficient to remove the deception created by the false impression where the material is finished to have the appearance of leather. In short, there is nothing in the use of the trade name alone which would meet the requirements set forth in answer to question 2.

(g) In response to the fourth question, Guide VI of the Shoe Guides sets forth a number of terms which would be acceptable in describing the nature of the material when it is finished to have the appearance of leather. Those terms are as follows: "simulated leather," "imitation leather," or that it is "ground, pulverized or shredded leather" (as the case may be). There are a variety of ways in which this objective could be accomplished and the foregoing quoted language is merely suggestive of some ways in which this could be done.

[35 FR 2656, Feb. 6, 1970]

§ 15.403 Union-employer agreement to cease importing a competitive product.

(a) The Federal Trade Commission rendered an advisory opinion in regard to the legality of labor unions entering into collective bargaining agreements with their employer manufacturers whereby the manufacturers will agree to cease importing products of the type they manufacture.

(b) It is alleged that the unions have made such a proposal to their employer manufacturers because of the increased imports which have resulted in decreased domestic production, increased domestic unemployment, loss of wages, etc. It is contemplated that penalties will be assessed against any manufacturer who violates the proposed agreement.

(c) The Commission concluded that the immunity afforded to labor unions for certain labor activities is lost if the union combines with non-labor groups to effect a restraint of trade not intimately related to wages, hours, and working conditions and otherwise prohibited by the antitrust laws or Federal Trade Commission Act.

[35 FR 2656, Feb. 6, 1970]

§ 15.404 Franchise sales promotion plan with pyramiding franchises and "Functional Override" commission implications.

(a) In a previous advisory opinion the Commission advised that a violation of section 5 of the Federal Trade Commission Act would result from the adoption of the following proposed franchise sales promotion plan.

(b) The plan centers around the sale of a fruit juice drink through franchise independent businessmen who will assist in the franchisor's growth by training additional franchisees. For such performance an original franchisee will be paid a "Functional Override", or commission, of 1 percent of the gross sales of those they recruit and train (direct franchisees) and one-half of 1 percent of the gross sales of those recruited and trained by direct franchisees (indirect franchisees). In addition, original franchisees will be granted loan credits and cash bonuses for persons proposed and accepted as franchisees.

(c) Although the plan was not intended to have "pyramid sales" implications and the "Functional Override" was to stop with the indirect franchisees insofar as an original franchisee is concerned, a direct franchisee may become an original franchisee and indirect franchisees may become direct, and subsequently originaly, franchisees by sponsoring other persons as franchisees. This being so the "Functional Override" continues throughout the chain down to the last indirect franchisee recruited who would be unable to derive any benefits from the plan for the reason that the continually expanding pyramid of franchises would prevent the later franchisees from successfully recruiting still other participants.

(d) A tabulation distributed through an operations manual to potential franchise purchasers indicates that an original franchisee may, in theory, benefit from the effort of at least twenty (20) other franchisees. This in the Commission's judgment is somewhat beyond the realm of possibility since an original franchise purchaser does not know the number of prior franchise purchasers nor the degree to which an available market has been saturated with franchises. The return to any given franchise participant will unquestionably be a great deal less than the theoretically achievable amount set forth. No single franchise participant can be certain what his return will be, if any, beyond perhaps that from his first few direct franchisees. Any further amount he might receive would accrue to him sheerly through chance.

[35 FR 3067, Feb. 17, 1970]

§ 15.405 Disclosure of imported fabric used in American flags.

(a) The Commission issued an advisory opinion with regard to the manufacture of American flags made from imported cloth that it would be necessary to clearly and conspicuously disclose the foreign country of origin of the printed fabric used in the production process under section 4(b)(4) of the Textile Fiber Products Identification Act.

(b) According to the facts considered in this opinion the printed fabric will originate in either Japan or Taiwan, depending upon where the best price can be obtained. The fabric will be shipped into the United States in a finished state in rolls of 50 to 100 yards per roll. Thereafter, it will be cut, hemmed on the side where cut, grommets attached, assembled, and packaged. The cost of the imported printed fabric or flag material will represent approximately 25 percent of total production costs. The remaining 75 percent will represent domestic labor and material costs. The latter consisting primarily of a pole upon which to hang the flag.

(c) Section 4(b)(4) of the Textile Fiber Products Identification Act provides, among other things, that an imported textile fiber product shall be misbranded if it is not labeled so as to show the name of the country where the product was processed or manufactured.

[35 FR 3993, Mar. 3, 1970]

§ 15.406 Origin labeling on kits containing imported beads.

(a) The Commission rendered an advisory opinion concerning the proper labeling of a product line of craft kits containing imported glass beads.

(b) Under the facts considered, the box containing the various items in the craft kit would be marked "Manufactured by * * *" with the name of an American company and its address although some of the items representing 20 percent of the total cost will consist of glass beads imported from Japan and Czechoslovakia. Additionally, loose beads in glass bottles will be offered for sale, the imported beads here representing about 40 percent of the total cost. Advice was requested as to whether each bottle should be marked with the name of the country from which the beads were imported, such as "Made in Japan," "Made in Italy," or "Made in France" as the case might be.

(c) The Commission's advisory opinion reaffirmed the rule that "Made in U.S.A." markings are permissible only on products entirely of domestic origin. Therefore, "Manufactured by * * *" with the name of the American company and its address, being synonomous, would be improper since 20 percent of the components of the kits consist of imported beads. However, in the absence of any affirmative representation as to the origin of the kits and their contents, the Commission ruled that such failure to mark or mention the origin of the components on the outside of the box would not be regarded as deceptive. This ruling will not prevail as to the glass beads being offered for sale to the public separately from the kits. In such circumstances, the country of origin of such items must be fully disclosed.

[35 FR 5174, Mar. 27, 1970]

§ 15.407 Association discussion limited to voluntary standardization not violative of outstanding cease and desist order.

(a) The Commission issued an advisory opinion in which an association of librarians was advised that contemplated meetings with various publishers for the limited purpose of discussing standardization of forms, definitions and cataloging would not be violative of Commission administered statutes or the terms of an outstanding cease and desist order prohibiting the publishers from meeting for the purpose of discussing industry selling practices and procedures. Because of the provisions of the order the publishers had heretofore refused to meet as a group.

(b) The Commission considered assurances that the proposed discussions would not involve matters of discounts, freight and other allowances, and other elements of price, and the fact that members of the association of librarians were book purchasers with a vital interest in the preservation of competition in the industry and the prevention of price fixing.

(c) The association was further advised that Commission approval was based upon an understanding that any agreements reached at such meetings are to be entirely voluntary actions of each party involved without compulsion in any form.

[35 FR 5542, Apr. 3, 1970]

§ 15.408 Debt collection forms and envelopes which simulate Government or other official documents.

(a) The Commission advised sellers of skip tracer and debt collection forms that a proposal to use forms simulating Government and other official documents would be regarded as violative of an outstanding cease-and-desist order and Commission administered statutes.

(b) In rejecting the proposal to use certain envelopes and forms, the Commission pointed out that:

(1) The general appearance of the proposed forms, when considered with numerous references to "Washington", "National", "Federal", Federal courts, and to the Federal Trade Commission, cause the forms to simulate Government or official documents.

(2) The forms do not disclose in a prominent place, in clear language and in type at least as large as the largest type (exclusive of captions) either that the sole purpose is to collect a debt, or that the U.S. Government is in no way connected with the request for payment.

(3) The forms do not disclose in a prominent place, and in clear language, the identity of the creditor to whom the debt is allegedly owed.

(4) The forms contain only a general statement of the rights of a creditor under state law to attach the real or personal property, income, wages, and other property of the debtor; the statement is misleading and inaccurate because, while it will be sold and used in many states, it does not set out the many variations in state laws, particularly the exemptions and restrictions.

(5) The forms represent by implication that the Federal Trade Commission and a federal court of appeals have approved them.

(6) The brown window envelope in which the forms are to be mailed simulate, by their general appearance and by reference to "Washington" and "Federal", envelopes used by the Federal Government for official purposes.

(7) Because of the similarity to envelopes used by the Federal Government, and references to "Washington D.C." and "Federal", the envelope seems to come from a party other than the creditor.

[35 FR 5999, Apr. 11, 1970]

§ 15.409 Labeling of reconditioned automotive parts.

(a) The Commission issued an advisory opinion with respect to labeling requirements applicable to used automotive engine accessories such as alternators, generators, starters, and similar parts which will be marketed in the United States after having been reconditioned in Taiwan with some new American or Taiwanese components such as wire and diodes.

(b) It was proposed that scrapped and otherwise used automotive parts would be acquired in the United States and shipped to Taiwan for reconditioning with such new materials as might be necessary, and then returned to the United States for final assembling and marketing. No information was available as to what percentage of total costs would be accounted for by shipping, foreign labor, components of a foreign origin, domestic parts, or domestic labor.

(c) Under these circumstances the Commission advised in general terms that:

(1) Labeling the reconditioned automotive parts "Made in U.S.A." would be a deceptive act or practice violative of section 5, Federal Trade Commission Act.

(2) The Commission would not object to a full disclosure of all relevant facts to purchasers of the merchandise; and

(3) Insufficient information had been supplied to permit an informed decision as to whether all reference to origin or place of work done may be omitted entirely from labels on the commodities.

(d) The Commission added that the United States Bureau of Customs should be consulted for applicable regulations affecting such activities.

[35 FR 5999, Apr. 11, 1970]

§ 15.410 Speed ratings and safety claims for tires.

(a) The Commission advised that the proposed advertising of speed rating and safety claims for foreign made automotive tires would be considered deceptive and in violation of section 5, Federal Trade Commission Act.

(b) The statements to be used in advertising and promotional materials included: "The (tire) has an HR* speed rating—this means it has survived tests at 130 MPH for 24 hours straight." "The (tire) is rated at 130 MPH for 24 hours straight." At the bottom of the page would appear this asterisked footnote: "*Internationally-recognized speed rating of the European Tyre and Rim Technical Organization. Established in supervised tests by professional drivers. Not intended to encourage high-speed driving."

(c) In a policy statement of June 3, 1969, entitled "F.T.C. Will Challenge Misleading Speed and Safety Representation in Automobile Tire Advertising," the Commission announced that "* * * it intends to challenge automobile tire advertising which misrepresents the overall speed and safety performance capabilities of tires. Examples of current advertising claims are '* * * built low and wide like a racing tire. Tested at 130 mph', '* * * all new, wide tire made especially for the young crowd and today's high performance cars', * * * certified safe at 100 mph. So you're safe at 60, 70, or 80', 'Safety tested at over 100 mph * * *', 'Stamina so great we safety tested them at 130 mph', and 'stops 25% quicker'."

(d) In the policy statement the Commission took the position that "There is reason to believe that claims of this type may be deceptive and misleading as to tire safety. The speed tests do not reveal how the tires will perform at such speeds under all road conditions encountered in normal driving at various stages of the life of the tires. Specifically, the tests do not reveal whether the tires at such speeds during normal use would withstand various road hazard impacts, the sustained flexing to which tires would be subjected, and whether the tires would remain seated on the rim of the wheel under such conditions."

[35 FR 5999, Apr. 11, 1970]

§ 15.411 Tripartite promotional plan involving use of "cents off" coupons.

(a) The Commission rendered an advisory opinion concerning a tripartite promotional plan involving use of "cents off" coupons redeemable after purchase of certain products sold in retail grocery stores.

(b) It was proposed that the promotion, designed to ultimately cover a single large metropolitan trading area, would be operated in a small portion of the area for 30 days and then moved to an adjoining area for another 30 day period until the entire metropolitan area had been covered. The value of each coupon will depend upon the product purchased and will be attached on the shelf where the product is displayed. Each package of the promoted product will bear a sticker which the shopper removes and places on the "cents off" coupon as proof of purchase.

(c) Participating manufacturers will pay a fixed fee for each retailer serviced, plus the value of the redeemed coupons, plus 2 cents to be passed on to cooperating retailers for services rendered. Each such supplier will be cautioned to notify his retail customers that the plan is available to them. Notice of the availability of the promotional plan will be made to retailers through wholesale distributors, local trade associations, advertising in the trade press, and through the buying offices of cooperatives and chain stores. In addition, spot checks of retail grocery stores in an intended area will be made by personal contact or telephone to determine whether they have knowledge of the program and that it is available to them.

(d) The Commission expressed the view that implementation of the proposed course of action in the manner described would be unlawful unless: (1) The plan is offered to all competing sellers of the supplier's products regardless of the type of store or location of the seller and (2) the value of the "cents off" coupon is accurately and adequately made known to the prospective purchaser prior to the purchase of the product to which the coupon relates.

[35 FR 6184, Apr. 16, 1970]

§ 15.412 Country of origin labeling on imported textile fiber garments.

(a) The Commission issued an advisory opinion concerning the requirements for noting the country of origin on labels of certain nylon or acrylic knit garments to be imported in the greige and thereafter dyed and finished in the United States.

(b) One garment, made of nylon, has an f.o.b. price of $13.50 per dozen and the other garment, made of polyester, has an f.o.b. price of $23 per dozen. The cost of dyeing and finishing the garments in the United States is between $8 and $12 per dozen, an approximate increase of 50 percent in value. After dyeing and finishing, the garments become merchantable wearing apparel and will be appropriately identified as to fiber content and the RN number.

(c) The Commission noted that Rule 34(a) of the rules and regulations issued as required by the Textile Fiber Products Identification Act provides that: "Where the form of an imported textile fiber product is not basically changed, the country where such product was originally manufactured or processed shall be set out in the required information. As for example, a fabric imported into the United States in the greige but finished and dyed in this country must show the country where the fabric was manufactured or processed."

(d) The Commission advised that the failure to mark the imported garments as to their country of origin would be violative of the Textile Fiber Products Identification Act.

[35 FR 6184, Apr. 16, 1970]

§ 15.413 Country of origin labeling on boxes containing imported bearings.

(a) The Commission rendered an advisory opinion concerning the proper marking of boxes containing metal bearings imported from Japan.

(b) It was proposed that the bearings, manufactured in Japan, will have the term "Made in Japan" etched into the metal of each bearing. Catalog advertising describing these bearings will bear the legend "Made in Japan".

(c) The Commission expressed the view that unless the box bears any representation that the content is a product of United States manufacture, the failure to mark thereon "Made in Japan" would not be deceptive.

[35 FR 6184, Apr. 16, 1970]

§ 15.414 Uniform warranty and warranty service system.

(a) The Commission rendered an advisory opinion concerning a "Zip" Warranty and Warranty Service System to be offered farm and industrial machinery manufacturers for use in connection with sales of their equipment.

(b) Under the proposed plan an equipment manufacturer, in warranting his merchandise, would supply: (1) A geographically convenient replacement parts depot from which repair and replacement parts would be readily available to dealers and users; (2) a central means for receiving and handling equipment deficiency reports and complaints; (3) an incentive award program for employee-assemblers of individual troublefree equipment; (4) a comprehensive, uniform warranty on all equipment; (5) a cash award program for employee-assemblers based on annual sales of troublefree equipment. The heart of the seventeen (17) page warranty and service plan is a series of cash and other awards intended to encourage purchasers to report equipment deficiencies and to encourage service personnel to strive towards the goal of zero defects.

(c) The Commission advised that use by farm and industrial equipment manufacturers of the submitted warranty plan would be unobjectionable except for the possible adoption by competitors of a warranty common to both. The Commission was of the view that it would be preferable for any participating supplier to establish the terms and conditions of his own warranty program without reference to the terms and conditions of a competitor's warranty program.

[35 FR 10109, June 19, 1970]

§ 15.415 Country of origin labeling on crates containing unfinished imported raincoats and on garments after being finished in the United States.

(a) The Commission rendered an advisory opinion with respect to: (1) Its requirements for foreign origin disclosure in the labeling on containers of unfinished "Dacron" polyester and rayon raincoat bodies and raincoat carry-bags to be imported from the Orient and (2) the necessity for disclosing the foreign country of origin on labels of the finished garments and bags which are to be sold as a unit to consumers at the retail level.

(b) Under the proposed operation various sized raincoat bodies will be imported without collars, buttons or buttonholes. Material for the carry-bags, cut to size, will also be imported without buttons or buttonholes. After importation, American made buttons and various styled American made collars will be sewn onto the coat body, and the buttonholes cut out and bound. American made buttons will be sewn onto the carry-bags and the buttonholes cut out and bound. The estimated costs in the operation are $2 as the f.o.b. value of the unfinished garment body and bag material and $1.23 as the cost of domestic labor and material.

(c) The submittal of facts disclosed that the Bureau of Customs would consider importer-finishers as the ultimate purchasers of the unfinished raincoats and bags within the meaning of the amended Tariff Act of 1930, and that an exception from the marking of the country of origin requirement on each individual raincoat body and carry-bag would be granted so long as the containers in which the unfinished material will be imported are legibly and conspicuously marked as to indicate the foreign country of origin of the contents and so long as Customs Officers at the Port of Entry are satisfied that such containers will reach the ultimate purchasers unopened.

(d) The Commission advised, based on its understanding of the factual submittal, particularly in light of the provisions of section 4(b)(4) of the Textile Fiber Products Identification Act and the labeling exception granted by the Bureau of Customs, that: (1) No additional marking on the containers or unfinished materials therein will be required beyond that requirement imposed by the Bureau of Customs; (2) that the raincoats to be sold to consumers at the retail level after having been finished in the United States must be labeled so as to clearly and conspicuously disclose the foreign country or origin of the imported fabrics; and (3) in the absence of any affirmative representation that the finished raincoat carry-bag is made entirely in the United States it will not be necessary to disclose the foreign country of origin of the imported fabric thereof.

[35 FR 10109, June 19, 1970]

§ 15.416 Meaning of phrase "Leave your pocketbook at home".

(a) The Commission rendered an advisory opinion concerning the proposed use of the phrase "Leave your pocketbook at home" in light of the requirements of the Truth in Lending Act, section 144, and Regulation "Z", promulgated thereunder (12 CFR 226.10(d)(2)).

(b) The phrase in question would be used in television and mail circular advertising by sellers of clothing at retail on installment sales contracts. It was presented that customers may make the first payment at some future time and that "The customer may take the clothing with him at the time the purchase is made rather that wait until the first payment has been made. In ninety-nine out of a hundred cases, the purchaser does take the clothing with him at the time the purchase is made."

(c) The Commission advised it had concluded that the proposed phrase is equivalent to, or synonymous with, a "no down payment" claim. Under these circumstances it would be improper to use the proposed phrase without disclosing the specific credit terms required by § 226.10(d)(2) of Regulation "Z". Specifically, the advertising must disclose the following credit information whenever no down payment claims are made:

(1) The cash price,

(2) The number, amount, and due dates or period of payments scheduled

to repay the indebtedness if the credit is extended.

(3) The annual percentage rate, and

(4) The deferred payment price of the article offered for sale.

[35 FR 10109, June 19, 1970]

§ 15.417 Use of term "manufacturer".

(a) The Commission rendered an advisory opinion as to whether producers of electronic display systems may be referred to as "manufacturers" of such equipment in informational materials furnished the press.

(b) It was submitted that such firms produce and sell electronic display systems and related equipment to those interested in obtaining current transactions on the stock exchange. In order to produce such equipment, various components such as electronic parts, motors, pumps, frames, and related materials are purchased from many sources and assembled into a completed unit at a manufacturing plant in the northeastern States. Some of these components are stock items, others are made to specification and in some instances machine work is necessary in order to properly assemble the basic components into completed units.

(c) On the basis of the information supplied, the Commission concluded that such producers, because they shape basic materials and components into finished products by hand-labor and by machinery, are the manufacturers of electronic display systems and related equipment. In the premises, the Commission advised that it would not object to references of such producers as the manufacturer of the systems in informational materials sent to the press.

[35 FR 10110, June 19, 1970]

§ 15.418 [Reserved]

§ 15.419 Tripartite promotion based on television game show.

(a) The Commission rendered an advisory opinion relative to the legality of a television game entitled "Your Name's a Winner" sponsored by a local retailer and national food suppliers.

(b) It was proposed that a television game show type program be produced and sponsored primarily by a local grocery retailer at a contract price determined by the number of "game pieces" (resembling Bingo cards) distributed by that retailer to customers for the play of the game. Home viewers cross off the letters of their own names on a game piece against those flashed on the television screen and receive all prizes appearing in the squares of the crossed-off row, including a hidden prize. The show producer would sell each square as advertising space to national manufacturers and suppliers, some of whom will be suppliers to the sponsoring retailer. The products involved in each advertising space would be prominently displayed during the course of the game show, and the suppliers of each would be featured at all times.

(c) The Commission expressed the view that insofar as a supplier to a retailer-sponsor is an advertising contributor to the game show problems under the amended Clayton Act would be present. The advertising rights of a national supplier purchasing a square constitutes a payment of something of value to or for the benefit of a customer within the meaning of that Act. On the other hand, if the advertising rights to all such squares are sold to non-suppliers of the sponsoring merchant so that a supplier customer relationship would not exist, the Act's prohibitions are not applicable.

(d) The Commission advised, because the proposed program contemplates that some of the advertisers would be suppliers to a sponsoring retailer, implementation and production of the television game show "Your Name's a Winner" in the manner outlined would raise serious questions under sections 2(d) and 2(e) of the amended Clayton Act and section 5, of the Federal Trade Commission Act.

[35 FR 10269, June 24, 1970]

§ 15.420 Multiple foreign origin of parts disclosure on partially imported toys.

(a) The Commission rendered an advisory opinion concerning a proposed country of origin labeling on the containers of sets of toy racing cars and tracks. The labeling would include the following language:

Contents made in Great Britain and/or U.S.A. and/or Canada, as specified therein.
Box printed in Great Britain.

(b) Seven different sets of toy racing cars would be sold through retail stores to the general public, with the most expensive set retailing at $22.50. At present, it is not known what percentage of the parts would originate in Great Britain, Canada or the United States. The plastic track would be made either in the United States or Canada, and the metal cars would originate in Great Britain. The paper container would also be made in Great Britain. The imported parts will be clearly and conspicuously marked as to their foreign country of origin. The cars and tracks will be packaged in a container which can, and normally would be opened for inspection by prospective purchasers prior to the purchase thereof.

(c) On the basis of the presentation, the Commission advised that it would interpose no objection to the proposed language being printed on the toy containers.

[35 FR 10269, June 24, 1970]

§ 15.421 Origin disclosure on imported (9 percent to 15 percent) air filter parts.

(a) The Commission responded to a request for an advisory opinion regarding a foreign country of origin marking on aquarium valves and filters.

(b) According to the presentation the merchandise in question is a two- three-, or four-outlet gang valve connected by a plastic tubing to an air filter. The entire device is mounted on a plastic bracket designed to be hung over the top edge of an aquarium. All parts of the assembly are manufactured in the United States except for the bracket and filter which are produced in and imported from Hong Kong. These parts are identical and represent about 15 percent of the total cost of the two-way gang valve, about 11 percent of the total cost of the three-way gang valve, and about 9 percent of the total cost of the four-way gang valve. The filter, including the filteration material with which it is filled, is designed for use for the life of the gang valve and in ordinary use it is not replaced.

(c) The Commission expressed the view that in the absence of any affirmative representation that the product is made in the United States or any misrepresentation that might mislead the purchasing public as to the country of origin of the bracket and filter, under the facts presented, the failure to mark the origin of the products would not be regarded as deceptive.

[35 FR 10269, June 24, 1970]

§ 15.422 Preticketing of imported candles.

(a) The Commission responded to a request for an advisory opinion with respect to the legality of importers affixing preprinted labels bearing a retailer's discount selling price on packages of prepriced imported candles.

(b) It was proposed that importers of packaged and prepriced candles would affix onto each individual package a pressure-sensitive label printed with a retail-customer's discount selling price. For example, the package as imported may bear a preprinted retail price of 41 cents and a retailer's discount selling price of 34 cents. Two questions were asked on the basis of this presentation:

(1) Is it permissible for importers of record to affix a discount operator's price label on the packages?

(2) If so, may this be done in the country of origin?

(c) The Commission expressed the view that the affixing by importers of a retailer's price on the package would not in and of itself be violative of the laws administered by this agency and that the place where this operation is performed would not be determinative of its legality. The Commission cautioned, however, that the contemplated arrangement is a preticketing scheme which must comply with the requirements of section 5 [illegible] Federal Trade Commission Act. (See Commission's Guides Against Deceptive Pricing (16 CFR Part 233).) Should the contemplated price saving claim as represented by the retailer's discount price label have the tendency and capacity to deceive and mislead the consuming public, then the importers as knowing participants in the preticketing arrangement would share responsibility for such deception.

(d) Further, if the service of affixing an individual customer's pricing labels on packages is not generally available on proportionally equal terms to all other of an importer's customers competing in the resale of imported candles, the providing of such a service to one customer may constitute a violation of section 2(e) of the amended Clayton Act.

[35 FR 10949, July 8, 1970]

§ 15.423 [Reserved]

§ 15.424 Tripartite promotional program using trash receptacle panels for advertising.

(a) The Commission responded to a request for an advisory opinion concerning a proposal to offer advertising panels on trash receptacles to advertisers of product and services.

(b) Under the program trash receptacles would be placed in public service areas where permission is obtained from the property owner, city government, or the person who controls the premises. Advertising thereon would be sold to producers on a yearly contract basis, the rates to be determined by the location and pedestrian traffic in the area. Product advertising will only advertise the product and will not indicate where it is available. However, service advertising will probably direct potential customers to the service.

(c) Physical servicing of the receptacles would be handled in many ways. Where they are placed on city streets, arrangements would be made with the city government to empty them and to report their condition. Where the receptacles are placed at motels, hotels, service stations, and like locations, arrangements would be made with persons who normally service such areas. Where the receptacles are placed in shopping centers or shopping malls, arrangements would be made with merchants within such areas to empty them and report on their condition. A fee would be paid to those rendering these services.

(d) The Commission expressed the view that payments to a merchant to service trash receptacles which may display advertising of products that he sells would be objectionable under section 2(d) of the amended Clayton Act. The proposed program would be unobjectionable under this Act where payments for servicing the receptacles are made to anyone other than merchants engaged in the sale of the advertiser's products.

[35 FR 10950, July 8, 1970]

§ 15.425 Combining advertising for mailing purposes.

(a) The Commission rendered an advisory opinion concerning a proposal to combine manufacturer and retailer advertising into one mailing piece. The intended program involves the attaching of packets containing direct-to-consumer redeemable coupons and other advertising material prepared for various manufacturers and service organizations to the tabloid or booklet type mail advertising of national or regional retailing organizations. The purpose of the proposed program is to minimize mailing costs for the participating organizations. As each party to the arrangement would pay a proportionate share of the preparation, postage and other mailing costs, the mailing expenses for each would be reduced about one-half.

(b) The Commission expressed the view that to the extent a participating retailer will realize a saving in mailing costs because the advertising material of one or more of his suppliers is inserted in the packets prepared by the other participant who is under contract with such suppliers, a discriminatory promotional allowance will have been accorded by such supplier to that retailer. However, the same result will not pertain where the packet contents are limited to those products and services not available from the participating retailer.

(c) The Commission advised that so long as precautionary measures are taken as will insure that the packet contents are limited to the advertising of those products and services which are not available from or through a participating retail organization, implementation of the proposed program in the manner outlined will raise no questions under section 2 (d) or (e) of the amended Clayton Act.

[35 FR 10950, July 8, 1970]

§ 15.426 Quality designation on jewelry of identical construction.

(a) The Commission responded to a request for an advisory opinion concerning a proposal to use the quality designation "Yellow Gold or White Rhodium Electroplated" on jewelry of identical construction which may be electroplated with either metal.

(b) The view was expressed by the Commission that although there may be some instances where a consumer might be able to properly interpret such a quality designation, the vast majority of consumers would be confused through use of any dual designation. Moreover, if the use of such a dual designation were to be approved, it would logically follow that approval would have to be given to the use of triple, quadruple, etc., designations. The end result would be utter chaos for the vast majority of consumers who would be thrown into a jungle of quality designations from which they could not intelligently extricate themselves.

(c) Under these circumstances, the Commission advised that it cannot give its approval to such dual quality designation because the use thereof would probably serve to confuse and deceive prospective purchasers in regard to the quality of the products being bought.

[35 FR 10951, July 8, 1970]

§ 15.427 Guarantee advertising for refrigerator compressors.

(a) The Commission rendered an advisory opinion regarding the proposed advertising of a 10-year guarantee for compressors used in refrigerators.

(b) The proposed advertising, which would appear as a 30-second television commercial, would guarantee the compressors for 10 years in writing and if they do not last that long a new compressor will be given the customer free, and further, for the first 5 years the manufacturer will pay labor charges and the customer will pay for pickup and delivery.

(c) The Commission advised that the proposed advertising is not in harmony with the language used in the submitted guarantee or with Guide 1 of the Commission's Guides Against Deceptive Advertising of Guarantees in three important aspects.

(1) The advertising offers a replacement for any compressor found to be defective, whereas the guarantee provides that any defect will be repaired or replaced. Thus, the advertising is inconsistent with the actual provisions of the guarantee. Either the advertising should be revised to conform with the guarantee and include the disclosure of a possible repair job or replacement, or the guarantee should be changed and made consistent with the proposed advertising. If an election is made to change the advertising, it should also disclose whether the guarantor or the purchaser has the option of repairing or replacing.

(2) The guarantee provides that the manufacturer will repair or replace any parts he finds defective. The fact that the manufacturer alone makes the determination as to whether or not a part is defective is a material limitation and should be disclosed in advertising.

(3) The guarantee provides that the customer will pay an "analysis charge for determining defects." This is a material limitation on the 10-year guarantee which could be a significant factor in the purchaser's selection of a refrigerator, and therefore the fact that an analysis charge is imposed should be disclosed in the advertising.

[35 FR 10951, July 8, 1970]

§ 15.428 Unqualified use of the word "Jewel" disapproved for advertising synthetic diamond.

The Commission issued an advisory opinion on May 19, 1970 (File No. 703 7098), to the effect that use of the term "Flare-Jewel" in advertising a synthetic diamond would violate Section 5 of the Federal Trade Commission Act unless there also was a clear disclosure that the stones were not natural stones or jewels.

[38 FR 28270, Oct. 12, 1973]

§ 15.429 Applicability of flammability standards to rental mats.

(a) The Commission issued an advisory opinion on June 2, 1970 (File No. 703 7105), with respect to whether mats rented by laundries must continually conform to the standard of flammability for carpets and rugs (DOC FF-1-70) promulgated by the Department of Commerce. The question arose as a result of a request by these laundries to the Secretary of Commerce to include a specific exemption for rental mats in the standard. The Department of Commerce notified the laundries that the standard was not intended to apply to rental mats, therefore, a specific exemption was not necessary. Applicants then requested an advisory opinion to determine whether the Commission agreed with the Commerce Department's determination.

(b) The Commission advised that the mats in question were within the scope of section 3(a) of the Flammable Fabrics Act and therefore must conform to the applicable flammability standard. The Commission also advised that the mat rentals in question were within the scope of section 5 of the Federal Trade Commission Act.

[38 FR 28270, Oct. 12, 1973]

§ 15.430 Advertising in retailer's catalog by suppliers disapproved.

(a) The Commission issued an advisory opinion on June 4, 1970 (File No. 703 7108), disapproving a proposed plan for suppliers' of products to advertise in retailers' catalogs.

(b) Under the plan, a retailer proposed to purchase products from manufacturers for resale to consumers by means of a catalog. Manufacturers of these products would be offered advertising space in the catalog at the rate of $3000 per half page and $6000 for a full page. Manufacturers who did not sell to the retailer would not be eligible to advertise.

(c) The Commission disapproved the plan as being violative of section 2(d) of the Clayton Act unless the manufacturers participating in the plan offered promotional assistance on proportionally equal terms to all of their other customers competing with the retailer in the distribution of their products. The Commission also said that knowing inducement of promotional assistance in violation of Section 2(d) of the Clayton Act would be a violation of section 5 of the Federal Trade Commission Act.

[38 FR 28270, Oct. 12, 1973]

§ 15.431 Tripartite advertising plan disapproved.

(a) The Federal Trade Commission issued an advisory opinion on June 10, 1970 (File No. 703, 7096), disapproving a tripartite advertising plan using grocery carts.

(b) The company proposed to lease advertising space on bascarts or similar equipment from supermarkets and other establishments. The company would then rent such space to third parties for the advertising of products supplied by them to the stores.

(c) The company proposed to inform all competing customers that if they took part in the plan they would receive the larger of a fixed amount per cart or a fixed percent of the total amount paid by the customer to any of its suppliers participating in this plan. The same payments would apply for equivalent space on a counter or wall if the participant had no carts or similar equipment.

(d) Reasonable action, including mail and personal solicitation, would be taken by the company to inform all competing customers of the availability of the plan.

(e) The Commission advised that implementation of the proposed plan would probably violate section 2(d) of the amended Clayton Act because the plan did not insure that all competing customers would receive payments on proportionally equal terms.

[38 FR 28270, Oct. 12, 1973]

§ 15.432 Proposed statistical program.

(a) The Commission issued an advisory opinion on June 10, 1970 (File No. 703 7107), with respect to the legality of a statistical reporting program to be implemented by firms in the plant food industry. Under the program, companies would confidentially provide specified data to a third party who would assemble the information and derive specified ratios and aggregate figures. This information, without disclosing names of individual companies, would be made available on a non-discriminatory basis to all who would have need for it. All United States and Canadian firms in the industry would be invited to participate whether or not members of the Institute.

(b) The Commission advised that there was nothing inherently illegal in the proposed plans and that it would not object to its implementation. The Commission cautioned, however, that an unlawful restraint of trade would result if the information collected with respect to individual companies was improperly used to restrict industry members' ability to buy and sell.

[38 FR 28271, Oct. 12, 1973]

§ 15.433 Disclosure of foreign origin of fish hooks.

(a) The Commission issued an advisory opinion on June 16, 1970 (File No. 703 7101), regarding the necessity of disclosing the foreign country of origin of imported treble hooks used in the manufacture of fishing lures. The hooks were to be imported from Norway and Sweden, and would represent less than 10 percent of the cost of producing the finished lures. The remaining 90 percent would represent the cost of American-made components.

(b) The Commission advised that in the absence of any affirmative representation that the fishing lures were made in their entirety in the United States, or any other misrepresentation that might mislead purchasers as to the country of origin, the failure to disclose the origin of the imported hooks would not be deceptive.

[38 FR 28271, Oct. 12, 1973]

§ 15.434 Proposed franchise program for replacement glass dealers.

(a) The Commission issued an advisory opinion on June 16, 1970 (File No. 703 7102), concerning a proposed franchise operation to conduct an automobile replacement glass business.

(b) A firm proposed to franchise qualified persons (principally existing automobile replacement glass businesses) to conduct an automobile replacement glass business, incorporating the firm's methods and procedures including its mobile installation service, trade names and service marks. In its franchise agreement, the firm would place no restrictions upon the franchisee's pricing policies, operating territory or customers to be served. The firm further proposed to charge an initial franchise fee, an advertising fee to be spent for advertising and promotion, plus a royalty and service fee for the use of its trade names and trade and service marks, in addition to various training, consulting, accounting and other services to be rendered by the firm. Franchises would be completely free to purchase part or all of their glass requirements from other sources, provided minimum specifications were met.

(c) The firm also proposed to reduce the royalty and service fees payable to a franchisee in proportion to the volume of his purchases of replacement glass from the firm. The proportionate reduction in royalty and service fees would be available to all franchisees on the same basis, though it was not intended that these reductions would be based on any "cost justification" formula.

(d) The Commission advised that implementation of the proposed program in the manner described would be in violation of section 3 of the Clayton Act, and possibly of section 2 of the Clayton Act, as amended by the Robinson-Patman Act. Provisions in the franchise agreement whereby the franchisee would be precluded from dealing freely in the goods of competitors under pain of higher royalty and service fees are subject to section 3 of the Clayton Act. Insofar as such royalty and service fees were reduced to some purchasers, a price discrimination under section 2 of the Clayton Act, as amended, might result as to other competing purchasers.

[38 FR 28271, Oct. 12, 1973]

§ 15.435 Publication of a monthly bulletin for circulation to suppliers of metal fabrications approved.

(a) The Commission issued an advisory opinion on June 23, 1970 (File No. 703 7112), regarding publication of a monthly bulletin for circulation on a subscription basis to suppliers to metal fabricators.

(b) The proposed publication would list the names of original equipment manufacturers of ranges, refrigerators, etc. and a brief description of their monthly requirements for metal fabrications including sizes, shapes, quality, quantity, engineering difficulty or sophistication, and closing dates for accepting quotations on these requirements.

(c) The Commission advised that the publication would not violate any law administered by the Commission.

[38 FR 28271, Oct. 12, 1973]

§ 15.436 Disclosure of origin of seam ripper blades.

(a) The Commission issued an advisory opinion on July 11, 1970 (File No. 703 7111), concerning the proper marking of the origin of seam ripper blades imported from West Germany. The imported blades would be assembled with plastic handles and sheaths of domestic origin and attached to display cards for resale to the general public.

(b) The Commission advised that it would be improper to label the seam rippers as "Made in U.S.A." and that it would be necessary to clearly and conspicuously disclose the country of origin of the imported blades on the front panel of the display cards.

[38 FR 28271, Oct. 12, 1973]

§ 15.437 Proposed method of selling denture cleanser disapproved.

(a) The Commission issued an advisory opinion on July 22, 1970 (File No. 703 7115), regarding a proposal for selling denture cleanser to grocery wholesalers and related outlets at higher prices than those at which the product was being sold to drug wholesalers.

(b) The product was being sold directly to drug wholesalers at suggested consumer and retail prices published in the Drug Topics' Red Book and the American Druggist's Blue Book.

(c) The firm proposed to expand distribution by selling to wholesale grocers and others through brokers while continuing direct sales to drug wholesalers. Because of the difference in selling costs as between direct and brokerage house sales, the firm proposed to increase prices in the amount of such increased costs to all purchasers other than drug wholesalers, such increase to reflect only the fees paid to brokerage houses for their services in selling the product.

(d) The Commission was of the view that to the extent the higher prices to be charged grocery wholesalers and related outlets included an amount paid brokers by the firm for their services in connection with the sale of the product, that an unlawful discount or allowance in lieu of brokerage to the drug wholesaler recipients of the lower prices would result.

[38 FR 28271, Oct. 12, 1973]

§ 15.438 Intermediary's tripartite promotional assistance plan approved.

(a) The Commission issued a favorable advisory opinion on August 3, 1970 (File No. 703 7106), concerning the advertising on delivery trucks belonging to food store chains and grocery product wholesalers, of products produced and sold by suppliers to the chains and wholesalers.

(b) Chains and wholesalers who did not own trucks would be given a cash allowance for in-store signs, handbills, local advertising or the like. All competing retailers would be offered equal terms based on the number of trucks operated or dollar volume of business done by the retailers in the advertised product.

(c) Notice of the plan's availability would be given by direct mail and advertising in trade journals.

(d) The Commission cautioned that the alternative methods of participating must be truly of equivalent value and appropriately communicated to the retailers.

(e) Subsequently, on September 11, 1973, the Commission rescinded the advisory opinion because it did not conform to the provisions of the Guides for Advertising Allowances and Other Merchandising Payments and Services, as amended August 4, 1972 (16 CFR Part 240).

[38 FR 28272, Oct. 12, 1973]

§ 15.439 Promotional plan involving pictures of products on grocery shelves qualifiedly approved.

(a) The Commission issued an advisory opinion on August 7, 1970 (File No. 703 7117), concerning an intermediary's proposed promotional assistance plan which would place product pictures on the shelves of retail stores.

(b) Under the plan, all competing retailers in the grocery, variety, drug, hardware, stationery, discount and department store fields would be offered a free service, which would supply pictures of products authorized by the retailer for display and sale. These pictures would be mounted on metal hooks and/or gondola shelving. If a retailer wished to pay for the service, he would be charged a specific rate for each picture installed. In return for the service, each retailer would be offered one-half of one cent per picture.

(c) In addition, in return for making the offer known and forwarding all orders to the intermediary, each jobber, wholesaler, voluntary and/or cooperative would be offered the same amount paid to each account for installation of the pictures. The payment would be in return for securing orders.

(d) Since the plan required the intermediary to assume certain obligations normally performed by a supplier, the Commission advised that it would be necessary to comply with Guide 13 of the "Guides for Advertising Allowances and other Merchandising Payments and Services" (15 CFR 240.13).

(e) The Commission also advised that if the cooperatives were retailer-owned, the intermediary could compensate the headquarters of such cooperatives, but could not compensate directly those retailers who owned the cooperatives. This would amount to double compensation and discriminate against those who produced directly or through jobbers or wholesalers.

(f) To avoid misunderstanding, the Commission suggested that the free offer and option to pay actual costs of the pictures be clearly explained in all promotional literature. This would insure that all prospective participants clearly understood the exact terms and conditions of the plan.

[38 FR 28272, Oct. 12, 1973]

§ 15.440 Distribution of a weekly magazine through retail outlets qualifiedly approved.

(a) The Commission issued an advisory opinion on August 12, 1970 (File No. 703 7116), giving qualified approval to a revised plan to distribute a weekly magazine through retail stores. A different plan, previously submitted to the Commission, was disapproved on June 22, 1970 (File No. 703 7096).

(b)(1) In the first plan the requesting company proposed to enter into a series of agreements with wholesale distributors of grocery products and retail sellers of grocery products that act as their own wholesalers for advertisements in a weekly television magazine to be distributed free through retail outlets. Magazines would be distributed to each retail outlet in numbers proportional to their annual dollar volume of sales.

(2) The company proposed to grant certain retailers individualized styling of the magazine and varying amounts of free advertising. Retail chains with higher annual sales would receive greater benefits.

(3) The Commission stated that implementation of the proposed course of action in the manner described would be in violation of the statutes administered by it for the reason that the plan was not considered functionally available to all classes of customers competing in the distribution of the advertiser's goods.

(c) Under the revised plan, a weekly television magazine would be distributed through retail outlets. The company would solicit advertisements for products sold in the retail outlets from the producers or suppliers of the products. The number of copies which a participating retail outlet received would be based on annual dollar volume of sales.

(d) Retailers would be notified of the availability of the plan in various ways designed to insure that each eligible retailer would have an opportunity to participate, including direct contact and regular advertisements in trade newspapers. Each participating retailer would be entitled to have its own trademark, symbol or other identification imprinted on the cover of the magazine, without charge. In addition, each retailer would receive a page in the body of the magazine to use for its own advertising purposes. The retailer would be required, however, to furnish the necessary layout at its own expense. Provision was made for those retailers unable, in a practical business sense, to take advantage of this offer to participate in an alternative way.

(e) The Commission advised that the revised plan would not warrant initiation of proceedings under laws administered by the Commission.

(f) The Commission added a caution, however, that suppliers should not include "special" offers such as coupons redeemable for a particular product in their advertisements. This, because resellers not stocking such products, would be placed improperly in the position of promoting such products. The Commission further directed the company to submit a written report to the Commission six months after initiation of the program, indicating the manner and extent to which it is being implemented.

(g) The Commission also advised the company that the promotional plan was to make it clear to each supplier and each retailer that even though the intermediary had been employed to implement the plan, it remained the supplier's responsibility to take all reasonable steps so that each of his customers who competes with another in reselling the supplier's products was offered either an opportunity to participate in the plan on proportionally equal terms or was offered a suitable alternative if the customer is unable as a practical matter to participate in the primary plan. If this was not done, the supplier, the retailer and the intermediary might be acting in violation of sections 2(d) or (e) of the Clayton Act and/or section 5 of the Federal Trade Commission Act.

[38 FR 28272, Oct. 12, 1973]

§ 15.441 Disapproval of the marking "Made in U.S.A." on finished items machined and assembled in U.S. from imported components.

(a) The Commission issued an advisory opinion on August 14, 1970 (File No. 713 7001) disapproving the marking "Made in U.S.A." for finished ball bearings when the bearing races in unfinished form are to be imported. All other parts and components would be produced in the U.S. In addition, all printing, finishing and assembly of the bearing would be done in the U.S. and the majority of the cost of the finished product would be expended in the United States.

(b) The Commission stated that the packaged bearing could not be marked "Made in U.S.A." since such marking would constitute an affirmative representation that the finished product was made entirely in the U.S.

(c) The Commission also advised that the failure to mark the origin of the packaged bearings would not be regarded as deceptive in the absence of any affirmative representation that the bearings were made in the U.S. or any other representation that might mislead the public as to the country of origin, and in the absence of any other facts indicating actual deception.

[38 FR 28273, Oct. 12, 1973]

§ 15.442 Tripartite promotional plan approved.

(a) The Commission issued an advisory opinion on August 28, 1970 (File No. 703 7109), relative to a proposed tripartite promotional plan involving in-store audio advertising.

(b) Under the plan an intermediary would promote to participating retail outlets in-store audio advertising through the use of taped background music with intermittent commercial announcements regarding products of the advertising manufacturer or supplier found in the store.

(c) Under the basic plan, compensation to each store would be computed according to a formula based on a fixed sum per 1,000 persons (customers) exposed to the promotional announcements, less a determinable portion of the expenses of producing the announcements. The computation of expenses would be based upon a formula per thousand persons plus the monthly charges for audio equipment, servicing, tapes, and music.

(d) In addition, the intermediary proposed to offer two alternative plans to retailers. Alternate Plan No. 1

would be designed for those outlets already providing background music, or those who wished a different music system. Alternate Plan No. 2 would be designed to make a plan functionally available to all competing retail outlets by providing them with in-store promotional material such as window banners, posters, handbills and shelf displays, as well as the assistance of merchandising specialists.

(e) Compensation under both alternative plans also would be a fixed sum for each 1,000 persons exposed to each promotional announcement, less a determinable portion of the expense for producing the promotional announcement or providing the merchandising aides.

(f) With the understanding that the complete details of the basic plan and the alternates would be fully and appropriately communicated to all competing retailers, the Commission was of the view that implementation of the proposed course of action in the manner described would not violate the laws administered by the Commission.

(g) Subsequently, on September 11, 1973, the Commission rescinded the advisory opinion because it did not conform to the provisions of the Guides for Advertising Allowances and Other Merchandising Payments and Services, as amended August 4, 1972 (16 CFR Part 240).

[38 FR 28273, Oct. 12, 1973]

§ 15.443 Dual designation of country of origin disapproved.

The Commission issued an advisory opinion on October 13, 1970 (File No. 713 7003), to the effect that designation of the country of origin by only using the words "Switzerland or Japan" would be confusing, misleading and possibly deceptive. The manufacturers, who utilize some musical units made in Switzerland and some made in Japan, sought to use the dual marking as a description of the country of origin of its musical toys.

[38 FR 28273, Oct. 12, 1973]

§ 15.444 Game of chance promotion given qualified approval.

(a) The Commission issued a qualified advisory opinion on November 13, 1970 (File No. 703 7113), regarding a game of chance promotion.

(b) Under the plan, customers over a wide geographic area would receive numbered game pieces each time they went to a participating retailer, whether they made a purchase or not. Periodically a drawing would be held to identify winning game pieces.

(c) The Commission advised that the game pieces should not be mixed together in batches of 5,000 and thereafter distributed to retailers because that would not be random distribution as required by the Commission's Trade Regulation Rule for Games of Chance in the Food Retailing and Gasoline Industries (15 CFR 419.1). The Rule requires that such mixing is to be on a totally and solely random basis throughout the game program and throughout the geographic area covered by the game.

(d) The Commission added that if the game was truthfully advertised on an outlet-by-outlet basis and if the game pieces for each outlet were mixed together and at the same time, the requirements of the Trade Regulation Rule would be met.

[38 FR 28273, Oct. 12, 1973]

§ 15.445 Location of disclosure of foreign origin.

(a) The Commission issued an advisory opinion on November 23, 1970 (File No. 713 7004), as to the proper location on imported items of a disclosure of the country of origin.

(b) The firm imports vinyl baby apparel bearing a label containing the words "Made in Taiwan." The apparel is sold in individual, clear poly bags containing no printing and the label is clearly visible through the bag.

(c) The Commission advised that failure to disclose the country of origin on the clear poly bags would not be deceptive.

[38 FR 28274, Oct. 12, 1973]

§ 15.446 Disclosure of former name of magazine unnecessary.

(a) The Commission issued a favorable advisory opinion on November 23, 1970 (File No. 713 7007), as to whether it was necessary to disclose the former title of a magazine on issues carrying the new title.

(b) Without approving or disapproving in anyway the propriety of the use of the title, the Commission advised that the magazine probably would not violate any law administered by the Commission by failing to disclose the former title on issues containing the new title.

[38 FR 28274, Oct. 12, 1973]

§ 15.447 Cooperative advertising by milk producers approved.

(a) The Commission issued a favorable advisory opinion on December 23, 1970 (File No. 713 7010), to a cooperative milk marketing organization covered by Milk Marketing Order No. 50 for the central Illinois area, which is administered by the Secretary of Agriculture.

(b) The cooperative proposed to establish a committee to promote brand name advertising of milk of a particular producer or handler as compared to the promotion of milk or milk products generally.

(c) The committee would receive funds from dairy farmers and/or dairy cooperatives. The funds would be used for research regarding milk and milk products. It also would be used for advertising and promoting milk on a brand name basis by means of cooperative advertising in accord with the Commission's Guides for Advertising Allowances, promulgated on May 29, 1969 (amended August 4, 1972).

(d) The Commission advised that the proposed plan probably would not result in violation of Commission administered statutes but that the feature of the plan restricting price announcements could not be approved. The plan must make it clear that reimbursement for advertising is not contingent on the price at which milk was offered.

(e) The Commission limited its approval solely to the proposed joint advertising program and cautioned that it was not to be construed as approval of any predatory practices or practices which might result in unlawful monopolization, unduly enhance prices or effect unlawful combinations or conspiracies between members of the cooperative and nonmembers. The Commission also advised that approval would be rescinded or revoked should subsequent facts indicate a failure on the part of the Committee to conform the advertising program with sections 2(d) and 2(e) of the Clayton Act, as amended.

[38 FR 28274, Oct. 12, 1973]

§ 15.448 Commission disapproves use of card which appeared to be a credit card but was not.

(a) The Commission issued an unfavorable advisory opinion on December 31, 1970 (File No. 713 7015), regarding a plan to send a card in size and appearance like a credit card together with a loan application to addressees whose names were obtained from chattel mortgage lists and lists of creditors obtained from credit bureaus.

(b) The recipient of the card would be treated the same as any other applicant for a loan.

(c) The Commission advised that the plan raised serious questions under section 5 of the Federal Trade Commission Act because cardholders might be deceived as to their eligibility for loans and the cards might be used to mispresent the credit worthiness of the holder to third parties.

[38 FR 28274, Oct. 12, 1973]

§ 15.449 Term "Diamonflare" disapproved for advertising a product which is not a natural diamond.

The Commission issued an advisory opinion on January 8, 1971 (File No. 713 7014), to the effect that use of the term "Diamonflare" for a product, which is not a natural diamond, would violate section 5 of the Federal Trade Commission Act unless there also was a clear and equally conspicuous disclosure immediately preceding the word "Diamonflare" that the product was not a natural diamond.

[38 FR 28274, Oct. 12, 1973]

§ 15.450 Tripartite promotional plan using recipe coupons approved.

(a) The Commission issued a favorable advisory opinion on January 11, 1971 (File No. 713 7006), regarding a proposed promotional plan involving a weekly menu-receipe-coupon featuring supplier advertising which would be offered to all food retailers in a given trade area for distribution to their customers.

(b) The Commission advised that the plan would not violate any law administered by the Commission provided:

(1) Guide 13 of the Guides for Advertising Allowances, promulgated May 29, 1969 (amended August 4, 1972), was observed;

(2) The plan was made available to all retailers competing in resale of advertisers' products;

(3) The advertising was limited to products normally sold by a retailer participating in the plan; and

(4) A report was submitted to the Commission every six months indicating the manner and extent to which the promotional plan was being implemented.

Subsequently, the Commission lifted the six month report requirement.

[38 FR 28274, Oct. 12, 1973]

§ 15.451 Marking of foreign origin on electrical relay devices.

(a) The Commission issued an advisory opinion on January 12, 1971 (File No. 713 7016), that no further markings relating to foreign origin would be required than those imposed in this instance by United States Customs.

(b) The company imported electrical relay devices from Germany. Each item was separately boxed by the foreign manufacturer. The Bureau of Customs advised the company that the name of the country of origin should be marked directly on the devices in a legible, conspicuous and permanent manner but that the boxes did not have to be marked with the name of the country of origin. If the boxes contained the name and address of the company, however, the boxes had to be marked with such words as "Made in Germany" in proximity to the name and address.

(c) The Commission cautioned that catalogs and all other advertising and samples used to solicit orders must clearly and conspicuously disclose the names of the country of origin.

[38 FR 28275, Oct. 12, 1973]

§ 15.452 Intermediary's tripartite promotional assistance plan qualifiedly approved.

(a) The Commission issued a favorable advisory opinion on January 14, 1971 (File No. 713 7017), regarding the legality of an advertising promotional plan but declined to render an opinion regarding the reporting of prices and volume of product movement aspect of the plan.

(b) Under the basic plan, the intermediary would rent space from retail outlets, paying each the same rental fee for the space. Frames to hold advertising cards would be installed and manufacturers and suppliers of products sold in the outlets would be solicited by the intermediary to buy advertising on the cards. All eligible retailers would be invited to participate and smaller signs would be offered retailers desiring them.

(c) The plan also called for participating retailers to report the price and the volume of movement of the advertised product.

(d) The Commission approved the basic plan with the understanding that suppliers would be informed that they were still responsible for compliance with the Robinson-Patman Act, even though the intermediary was positioned between them and retailers selling their products. The Commission also expressed the view that, since implementation of the exchange of price or quantity information might bring about a lessening of competition, it would be inappropriate under Commission Rule 1.1(c) to issue an advisory opinion as to that aspect of the plan.

[38 FR 28275, Oct. 12, 1973]

§ 15.453 Commission declines to issue an advisory opinion on promotional game.

(a) The Commission declined to issue an advisory opinion on January 15, 1971 (File No. 713 7013), regarding a promotional game involving the stock market.

(b) The proposed plan consisted of a weekly game or contest distributed through participating retail gasoline stations. Each contestant would receive an entry card entitling him to participate in that week's contest. The card listed fifty New York Stock Exchange corporations from which the contestant must choose the five most likely to appreciate in the coming week. Winners were then chosen by computer on the basis of each stock's performance.

(c) The Commission advised that the request for an advisory opinion was inappropriate under § 1.1(b) of the Rules of Practice because the plan was substantially the same as several others that were under investigation by the Commission.

[38 FR 28275, Oct. 12, 1973]

§ 15.454 Offer of a "free" balloon disapproved.

(a) The Commission issued an advisory opinion to an advertising company on February 17, 1971 (File No. 713 7011), that copy offering a "free" balloon would violate Section 5 of the Federal Trade Commission Act.

(b) The copy proposed to advertise an offer for a "free" balloon in connection with the purchase of a soft drink. The front side of the bottle hanger, on which the advertising copy appeared, advertised a "free" balloon. On the reverse side, however, appeared the requirement that ten cents be remitted to pay for postage.

(c) The Commission advised that the advertising would be misleading unless the requirement that the consumer submit ten cents were disclosed clearly on the front side of the bottle hanger and in any other advertisements. Otherwise, if the word "free" were used in the promotion, the company and not the consumer would have to pay the cost of return postage.

[38 FR 28275, Oct. 12, 1973]

§ 15.455 Commission declines to issue advisory opinion on reciprocal advertising plan.

(a) The Commission declined on February 17, 1971 (File No. 713 7019), to issue an advisory opinion to an intermediary regarding a proposed reciprocal advertising plan.

(b) Under the plan, supermarkets would use space on their private-label packaging and on shopping bags for advertising of local television and radio stations. The number and type of packages and bags distributed would determine how much television and radio time the supermarket would earn to advertise the store and its private-label merchandise. The intermediary would be paid by the supermarkets.

(c) The Commission advised that it would be inappropriate under Commission Rule 1.1(c) to render the advisory opinion because an informed decision could be made only after extensive investigation or collateral inquiry. The Commission stated that its action implied neither approval nor disapproval of the plan.

[38 FR 28275, Oct. 12, 1973]

§ 15.456 Disclosure of foreign origin of products in newspaper advertising.

(a) The Commission issued an advisory opinion on February 26, 1971 (File No. 713 7020), concerning the disclosure of the foreign origin of products advertised in newspapers.

(b) The products advertised were labeled so as to disclose the country of foreign origin and the advertisements did not promote mail-order or catalog purchases.

(c) The Commission advised that the name of the foreign country of origin need not appear in the newspaper advertisements and that it would be permissible simply to use the word "imported" in the advertisements, provided that the products were not imported furs or fur products containing imported furs.

(d) The Commission also advised that section 5(a)(6) of the Fur Products Labeling Act requires disclosure of the name of the country of origin imported in advertising imported fur products.

[38 FR 28276, Oct. 12, 1973]

§ 15.457 Legality of proposed standard certification program.

(a) The Commission issued an advisory opinion on March 8, 1971 (File No. 713 7002), in regard to a proposed certification program.

(b) Under the proposal, any manufacturer of a product covered by an industry developed standard could apply to have the product certified as conforming to the standard. The fees for submittal of a product to be certified would be designed to support the program but to avoid placing participating manufacturers at a disadvantage in competing with nonparticipating manufacturers.

(c) An independent qualified laboratory, selected by the producer's trade association or by the producer, and approved by the institute coordinating development of the standard, would determine whether the product complied with the standard. An approved certification mark could be placed on products submitted which were found to comply. Also, a public information program to inform consumers regarding the certification and what it meant would be in use, and periodically a listing of certified products would be issued.

(d) To check on continued compliance of a certified product with the standard, there would be continuing inspection and follow-up by the testing laboratory, using procedures tailored for each standard and administered by the appropriate trade association, all to be monitored by the coordinator.

(e) In order to balance the need for development of self-regulation plans against the possible anticompetitive potentialities of such plans, the Commission set out some of the matters which must be considered in an evaluation of any program, as follows:

(1) Standardization and certification programs must not be used as devices for fixing prices or otherwise lessening competition. See, e.g., *Milk and Ice Cream Can Institute* v. *F.T.C.*, 152 F.2d 478 (7th Cir. 1946).

(2) Standardization and certification programs must not have the effect of boycotting or excluding competitors. See, e.g., *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963).

(3) Standardization and certification programs must not have the effect of withholding or controlling products. See, e.g., *Standard Sanitary Mfg. Co.* v. *United States*, 226 U.S. 20 (1912); *National Macaroni Manufacturers Ass'n* v. *F.T.C.*, 345 F.2d 421 (7th Cir. 1965).

(4) Construction or specification standards should not be used except in exceptional circumstances and never when performance standards can be developed.

(5) Any organization sponsoring, adopting, administering, or enforcing standards must insure that its standards reflect existing technology and are kept current and adequately upgraded to allow for technological innovation.

(6) When certification is involved, no applicant for certification may be denied certification for any of the following reasons: (i) That he is a nonmember of any association or organization; (ii) that he is a foreign competitor; or (iii) that he is unable to pay the fee or cost charged for certification. See Advisory Opinion Digest No. 152, 1 CCH Trade Reg., Rep. Para. 1718.10 (December 13, 1967), 16 CFR 15.152.

(7) Fees charged in connection with participation in a standardization or certification program must be reasonable as related to the direct or indirect cost involved.

(8) Membership in groups or organizations sponsoring, promulgating or administering standardization or certification programs must be open to all competitors, domestic or foreign.

(9) Due process must be accorded all parties interested in or affected by a standardization or certification program, including suppliers, manufacturers, distributors, customers, and users. Due process includes, but is not limited to, the conduct of timely hearings with prompt decisions on claims representing standards or the denial of certification.

(10) Standards and certification programs, unless otherwise clearly required by considerations of safety, may not be used to reduce, restrict or limit in any manner, the kinds, quantities, sizes, styles or qualities of products. See, e.g., the consent decree in

United States v. *General Electric Co.*, 1954 Trade Cas. paras. 67,714, 67,794, 67,795, 67,796 (D. N.J. 1954).

(11) The exercise of the responsibility of validating any proposed standard should include a determination by a laboratory or other appropriate entity independent of those immediately affected by the proposed standard that the criteria set forth in such standard are meaningful and relevant. See, e.g., the consent decree in *United States* v. *Southern Pine Ass'n*, 1940-43 Trade Cas. para. 56,007 (E.D. La. 1940).

(12) The function and responsibility of determining whether any product is to be certified under any program involving certification should be performed by an appropriate organization independent of those immediately affected by such program. See, e.g., *United States* v. *Southern Pine Ass'n*, *supra*.

(13) Representations made by standards organizations with respect to testing procedures, standards, etc., must be truthful. See. e.g., *In the Matter of Parents' Magazine Enterprises, Inc.*, FTC Dkt. No. C-1133 (1966), 70 F.T.C. 1116.

(14) In cases involving a challenge to standards, the burden of proof respecting reasonableness is upon those who develop and enforce the standards. See, e.g., *Kestenbaum, Antitrust Questions In Voluntary Industry Standards*, p. 10, address prepared for delivery before the National Association of Manufacturers Marketing Conference (October 9, 1969).

(15) All standards must be voluntary.

(16) Certification programs should avoid the use of single standard, "pass/fail" systems and, in lieu thereof, employ graded systems which preserve consumer and user options.

(f) The Commission stated that the listed criteria were by no means exhaustive, but demonstrated the many factors which make it difficult to approve a standard certification program. The Commission directed its staff to commence an in-depth study of the subject to determine whether it is possible for the Commission to make a meaningful contribution to the development of a satisfactory and legal program.

(g) For these reasons, the Commission felt it was not in possession of sufficient information to enable it to make all of the determination essential to an evaluation of the program. It therefore declined to act on the request for an advisory opinion.

[38 FR 28276, Oct. 12, 1973]

§ 15.458 Commission declines to issue an advisory opinion re manufacturer's dealer purchase stimulation plan.

(a) The Commission declined on March 11, 1971 (File No. 713 7021), to issue an advisory opinion concerning a purchase stimulation plan whereby dealers might earn points in order to qualify for an expenses paid trip to Rio de Janeiro or London.

(b) Under the plan, photo equipment and accessories sold by the firm which requested the opinion would be given varying point values. Dealers could accumulate points by purchasing various items. An aggregate of purchases ranging between $14,000 and $20,000 would earn the dealer enough points for a trip. Points earned would be credited toward qualifying for one or more trips by groups of dealers.

(c) The Commission advised that an advisory opinion would be inappropriate under Commission Rule 1.1(c) because an informed decision could be made only after extensive investigation and collateral inquiry.

[38 FR 28276, Oct. 12, 1973]

§ 15.459 Request for advisory opinion re merger declined.

(a) The Commission issued an advisory opinion on March 12, 1971 (File No. 713 7008), regarding the proposed acquisition by a cement aggregate producer and supplier of aggregate to the corporation to be acquired. The corporation proposed to acquire all of the physical assets except mixing trucks located in certain cities.

(b) The acquisition came within the purview of the Commission's Enforcement Policy with respect to Vertical Mergers in the Cement Industry dated January 3, 1967.

(c) The Commission advised that the corporation which proposed to make the acquisition had failed to supply sufficient information to enable the Commission to determine whether it had jurisdiction in the matter. due to the intrastate character of the firm's operations. However, the Commission said that if the acquisition were consummated an investigation would ensue to determine whether it had jurisdiction and whether the acquisition was legal.

[38 FR 28277, Oct. 12, 1973]

§ 15.460 Intermediary's tripartite promotional assistance plan approved.

(a) The Commission issued a favorable advisory opinion on March 12, 1971 (File No. 713 7022), regarding a proposed tripartite promotional assistance plan.

(b) Under the plan, the intermediary would rent space and slide projectors, which would carry advertising of packagers of food and grocery products. The projectors would be installed in retail outlets. Outlets unable to utilize the projectors would be provided photographic prints or color slides as an alternative. No retailer would be obliged to display an advertisement for a product he did not stock.

(c) All competing retailers would be solicited to participate. Those participating would be paid rentals on the basis of sales transactions in their stores as determined by statistics compiled by Progressive Grocer Magazine.

(d) The Commission advised that implementation of the plan would not warrant proceedings under the laws it administers provided: (1) Guide 13 of the Commission's Guides for Advertising Allowances (promulgated May 29, 1969) were observed; (2) all types of competing retail outlets were offered the plan; (3) retailers were not obliged to carry advertisements for products they did not stock; and (4) a report on the plan's operation was submitted six months after its institution.

(e) Subsequently, on September 11, 1973, the Commission recinded the advisory opinion because it did not conform to the provisions of the Guides for Advertising Allowances and Other Merchandising Payments and Services, as amended August 4, 1972 (16 CFR Part 240).

[38 FR 28277, Oct. 12, 1973]

§ 15.461 Advisory opinion on debt collection agency withheld.

(a) The Commission declined to issue an advisory opinion on March 22, 1971 (File No. 713 7023), pursuant to § 1.1(b) of the Rules of Practice, because substantially the same program was currently being investigated; hence, the request for an advisory opinion was inappropriate under Commission Rule 1.1(b).

(b) The requesting party had proposed to provide a debt collection service available at a set fee per account. The service involved the sending of a series of nine progressively stronger collection letters, with possible referral to an attorney or agency for collection.

[38 FR 28277, Oct. 12, 1973]

§ 15.462 Promotional assistance plan using shopping carts disapproved.

(a) The Commission issued an advisory opinion on April 2, 1971 (File No. 713 7024), disapproving a plan to sell advertising space on shopping carts and to provide advertising placards if the retailer had no carts.

(b) Each retailer would be placed in one of five categories depending upon his monthly dollar volume of business. Retailers would be compensated on the basis of the monthly volume per store and the number of carts or placards rented for advertising purposes.

(c) The Commission advised that implementation of this plan would result in discriminatory promotional allowances being granted to customers competing in the resale of a participating supplier's product in violation of section 2(d) or 2(e) of the amended Clayton Act and/or section 5 of the Federal Trade Commission Act.

[38 FR 28277, Oct. 12, 1973]

§ 15.463 Advisory opinion declined on mail order business to sell acne remedy.

The Commission declined to issue an advisory opinion on April 14, 1971 (File No. 713 7009), as to whether advertising for certain products designed as a remedy for acne would violate any of the statutes which the Commission enforces because it was impractical for it to make an informed decision on the plan. The advertising pertained to dietary information and use of calamine lotion as acne remedies.

[38 FR 28277, Oct. 12, 1973]

§ 15.464 Sale of promotional assistance device approved.

(a) The Commission issued an advisory opinion on May 5, 1971 (File No. 713 7025), regarding a proposal to sell a patented electric operated advertising device to suppliers for them to furnish to retailers to promote the sale of the suppliers' products in the retailers' stores.

(b) The machines would be sold outright to the suppliers and no action to promote use of or to place the machines on behalf of the purchasers was contemplated.

(c) The Commission advised that implementation of the plan would not warrant initiation of proceedings by the Commission. The Commission also pointed out that the opinion did not relate to the legality of the patent or the right to use the patent.

[38 FR 28278, Oct. 12, 1973]

§ 15.465 Advertising of a book on investing approved.

(a) The Commission issued a favorable advisory opinion on May 25, 1971 (File No. 713 7012), regarding an advertisement for a book on investing. The advertisement set forth some of the claims of the book and also used the words "satisfaction guaranteed."

(b) As to the words "satisfaction guaranteed," the Commission advised that their use would violate the Commission's Guides Against Deceptive Advertising of Guarantees" (16 CFR 239.1, 239.3 (1970)) because the advertisement failed to disclose that refund of the full purchase price, under the guarantee, is subject to the condition that the book be returned within ten days of receipt by the purchaser.

(c) The Commission also advised that proceedings by it would not be warranted provided the advertising only purports to express the opinion of the author or to quote the contents of the book; the advertising discloses the source of statements quoted or derived from the contents of the book; the advertising discloses the source of opinions expressed about the book; and, the book is not promoting another product as part of a commercial scheme.

[38 FR 28278, Oct. 12, 1973]

§ 15.466 Legality of proposed product quality certification program.

(a) The Commission denied a request for an advisory opinion on June 4, 1971 (File No. 713 7026), concerning a proposed quality certification program because the Commission had directed an in-depth study of the subject of industry self-regulation through standard certification.

(b) The Commission advised that it would be inappropriate for it to act in this area until the results of the study were known.

[38 FR 28278, Oct. 12, 1973]

§ 15.467 Legality of distribution to automotive parts manufacturers of information on interchangeability of parts manufactured by different companies.

(a) The Commission issued an advisory opinion on June 25, 1971 (File No. 713 7028), as to the legality of distributing to competing manufacturers of automobile parts, which are sold in the automotive aftermarket, a "composite interchange" showing by part number only, the interchangeability of their products with parts produced by original equipment manufacturers and with each other.

(b) Original equipment manufacturers assign part numbers to those parts which they manufacture. Likewise, the many manufacturers of automotive parts sold in the automotive aftermarket assign their own numbers to parts, many of which are interchangeable with each other and with those of the original equipment manufacturers. The requesting party's proposal was to provide listings of interchangeable parts, by part number, to any manufacturers who wished to receive them.

(c) The Commission concluded that implementation of the proposal would not warrant a proceeding under the laws it administers, providing the following conditions were observed:

(1) All manufacturers of competing product lines for resale in the automotive aftermarket would, in fact, be accorded an equal and continuing opportunity to participate in the program proposed; and

(2) The part number references contained in the proposed publication would not be used in such a manner as would result or be likely to result in the unlawful stabilization of existing pricing structures within the industry.

[38 FR 28278, Oct. 12, 1973]

§ 15.468 Use of the words "Golden Finish," "Gold Brushed," and "Golden Manner," in advertising of certain gold plated costume jewelry.

(a) The Commission issued an adverse advisory opinion on July 2, 1971 (File No. 713 7031), regarding use of the terms "Golden Finish," "Gold Brushed," and "Golden Manner," as descriptive of costume jewelry containing a gold coating of ten-karat fineness and three-millionths to five-millionths of an inch thick.

(b) The Commission advised that the fineness and thickness of the jewelry fell within its guidelines for "gold flash," or "gold washed" jewelry, as set out in Rule 22C(3) of the Commission's Trade Practice Rules for the Jewelry Industry (16 CFR Part 23).

(c) The Commission also expressed its opinion that, if it were to sanction the use of the new terms proposed, it might result in a proliferation of meaningless descriptive terms tending to confuse consumers and industry members.

[38 FR 28278, Oct. 12, 1973]

§ 15.469 Intermediary's tripartite promotional assistance plan disapproved.

(a) The Commission issued an advisory opinion on July 16, 1971 (File No. 713 7030), disapproving a tripartite promotional assistance plan whereby labels from grocery and household products might be redeemed when affixed to designated portions of a book to be sold to competing retailers.

(b) The intermediary proposed to offer retailers an opportunity to purchase personalized label redemption books to be distributed to their customers and to be redeemed by the store. Each redeemable page would contain label depictions of different products of a given manufacturer. Retailers need not stock these items to be compensated for their redemption. Each retailer had the right to excise any redeemable pages in their entirety. Retailers would be entitled to purchase redemption books based on their number of operable cash registers.

(c) The Commission advised that the plan failed to provide functional availability on proportionally equal terms because of the feature of the plan which allowed the deletion of only full pages by the retailer. A retailer who did not stock all of the items advertised must, in effect, encourage his customers to shop elsewhere for the labels from products he does not carry. The Commission was of the view that deletion of only full pages would create a situation where retailers received disproportionate compensation on a per product basis. Because some retailers will stock only some of the products on a page containing several labels, the per product compensation received would be greater than that received by a retailer stocking all items on a particular page.

(d) The Commission also advised that the allocation of books to retail stores based on the number of operable cash registers, failed to provide the proportionally equal treatment required by section 2 of the amended Clayton Act.

[38 FR 28278, Oct. 12, 1973]

§ 15.470 Tripartite promotional assistance plan approved.

(a) The Commission issued an advisory opinion on September 3, 1971 (File No. 713 7027), regarding a tripartite promotional assistance plan under which mechanized display units bearing advertisements would be installed in retail outlets. Retail stores unable to use the basic plan would be offered mechanisms handling fewer signs, stationary signs, shelf signs, flyers, or handbills. Most of the advertising would promote products sold in the store and retailers would not be obliged to accept advertisements for products which they do not stock.

(b) Retailers would be apprised of the plan by advertisements in trade journals and by direct contact. Payments to retailers would be based upon the number of cash register transactions at each participating retail outlet, with a fixed maximum and minimum annual payment. Retailers who participated by distributing handbills or other alternatives would also be paid an amount equal to what they would have received if they rented space for signs.

(c) Subsequently, on September 11, 1973, the Commission rescinded the advisory opinion because it did not conform to the provisions of the Guides for Advertising Allowances and Other Merchandising Payments and Services, as amended August 4, 1972 (16 CFR Part 240).

[38 FR 28279, Oct. 12, 1973]

§ 15.471 Designation of gold content on ball point pens.

(a) The Commission issued an advisory opinion on September 7, 1971 (File No. 723 7001), regarding the proper marking of gold content on ball point pens.

(b) The Commission advised that the words "electroplate" or "electroplated" should not be abbreviated because many consumers would not know what the abbreviation signified.

(c) Karat fineness of such a pen may be represented by placing the karat designation before the words "gold electroplate(d)."

(d) Thickness of the gold plate may be represented by placing the thickness designation in terms of inches only before the words "gold electroplate(d)."

(e) A weight designation such as "1/80 22K Gold Electroplate" may not be used on gold electroplate because its use might confuse consumers.

[38 FR 28279, Oct. 12, 1973]

§ 15.472 Commission declines to issue advisory opinion re proposed merger.

(a) The Commission declined to issue an advisory opinion on September 21, 1971 (File No. 713 7029), regarding a proposed acquisition by one insurance company of the majority of the capital stock of another. The Commission considered the request inappropriate under § 1.1(c) of its Rules because an informed decision could not be made without an extensive investigation.

(b) Some of the relevant factors to be examined would include the history, structure and behavior of the industry and markets affected by the acquisition, the effects on potential competition and barriers to entry.

(c) The Commission emphasized that it was expressing no view on whether, if the acquisition were consummated, it would issue a complaint.

[38 FR 28279, Oct. 12, 1973]

§ 15.473 Applicability of flammability standard to bath mats.

(a) The Commission issued an advisory opinion on December 2, 1971 (File No. 723 7003), regarding the applicability of the Standard for the Surface Flammability of Small Carpets and Rugs (DOC FF 2-70), issued under the Flammable Fabrics Act, to terry cloth bath mats. The standard for small carpets and rugs was proposed as a complementary standard to that for surface flammability of carpets and rugs (DOC FF 1-70), from which the small carpets and rugs were exempted.

(b) The Commission noted that the definition of "small carpet" as contained in DOC FF 2-70 clearly appeared to encompass bath mats. This, in part, reads as follows:

> "(c) 'Small Carpet' means any type of finished product made in whole or in part of fabric or related material and intended for use or which may reasonably be expected to be used as a floor covering which is exposed to traffic in homes, offices, or other places of assembly or accommodation * * *."

(c) [Reserved]

(d) The Commission also noted that further inquiries by members of its staff disclose that bath mats were the product which was responsible for the exclusion of small carpets and rugs from DOC FF 1-70, and for the development of a less rigid standard (DOC FF 2-70), which permits the cautionary labeling for small carpets and rugs which do not meet the minimum flammability requirements.

(e) In view of the circumstances, the Commission was of the opinion that there was no doubt that bath mats were included within the scope of the Standard for the Surface Flammability of Small Carpets and Rugs (DOC FF 2-70).

[38 FR 28279, Oct. 12, 1973]

§ 15.474 Legality of proposed subscriptions renewal voucher offer.

(a) The Commission issued an advisory opinion on December 10, 1971 (File No. 723 7004), regarding a proposed plan to advertise and use a special renewal voucher to be applied to subscription renewals for a magazine.

(b) The voucher was to be given to new subscribers who submitted two dollars with their request for a trial subscription and was to be worth one dollar when applied to a one year renewal subscription after the expiration of the trial period.

(c) The Commission advised that based upon the information furnished it would not initiate proceedings under statutes it administers providing the plan was implemented in the manner described.

[38 FR 28280, Oct. 12, 1973]

§ 15.475 Maintenance of a pool of information by trade association proper.

(a) The Commission issued a favorable advisory opinion on January 7, 1972 (File No. 723 7005), regarding an association plan to pool information regarding members' experiences with equipment they use and to serve as a conduit for referral of members' complaints and manufacturers' responses.

(b) Under the plan, members would submit executed forms to the association, showing the make and model of machines used and their experiences with regard to installation, maintenance and operation of the machines. They also would submit complaints, which the Section would send to the manufacturers, inviting the manufacturers to respond via the Section. No forms would contain information as to prices paid for the machines, equipment, service charges or the like.

(c) Association members and new entrants to the industry would have access to the forms after the names of the complaining members had been deleted. Manufacturers would have access only to forms pertaining to their own equipment.

(d) The Commission cautioned that great care must be used to avoid the plan's becoming illegally coercive and from becoming the means to boycott or intimidate manufacturers. The Commission also said participation by section members must be voluntary and that nonmembers should be allowed access to the forms but that a reasonable fee might be charged.

(e) The Commission also advised: (1) That manufacturers and their equipment should not be evaluated, (2) that recommendations should not be made regarding use of particular equipment, and (3) that lists of "approved" manufacturers or equipment should not be prepared. The reason is that such actions would suggest an illegal boycott or blacklist had been prepared.

[38 FR 28280, Oct. 12, 1973]

§ 15.476 Representations of gold content on jewelry.

(a) The Commission issued an advisory opinion on August 18, 1972 (File No. 723 7007), regarding the proprietary of stamping "18K H.G.E.," or alternatively attaching a tag to the jewelry item bearing the words "18K Heavy Gold Electroplate." The electroplated item would be covered throughout with a minimum of 100/1,000,000 of fine gold, in conformity with the Trade Practice Rules for the Jewelry Industry (16 CFR Part 23).

(b) The Commission advised that use of "18K H.G.E." alone would be improper because consumers probably would be misled as to its meaning.

(c) The Commission rejected the suggestion that no quality disclosure need be made if a disclosure only could be made by use of an abbreviation. The Commission advised that a full disclosure should appear on items large enough to accommodate it and that the maximum reasonable abbreviated disclosure should be made on small items, with a tag attached containing the full disclosure.

[38 FR 28280, Oct. 12, 1973]

§ 15.477 Credit reporting plan disapproved.

(a) The Commission issued an advisory opinion on September 21, 1972 (File No. 733 7001), to the effect that furnishing credit information to lawyers with regard to prospective jurors would violate the Fair Credit Reporting Act. The firm was a "consumer reporting agency" within the meaning of section 303(f) of the Act and proposed to obtain a general order to be signed by judges of the United States District Court authorizing the Court to furnish such information. The credit information to be furnished constituted "consumer reports" within the meaning of section 603(f) of the Act.

(b) The Commission advised that such a general order would not be an order the Court could properly issue under section 604(1) of the Act.

(c) The Commission also advised that it was of the opinion that investigation of prospective jurors by attorneys is not a business transaction involving the consumer within the meaning of section 604(3) (E) of the Act.

[38 FR 28280, Oct. 12, 1973]

§ 15.478 By-laws of organization for marketing research approved.

(a) The Commission issued a favorable advisory opinion on November 21, 1972 (File No. 703 7063), approving the by-laws of an organization created to establish standards and accreditation procedures to improve the reliability of consumer research projects.

(b) Market researchers would probably control the board of directors of the organization whose members would be manufacturers, retailers, advertising agencies, media representatives and market data researchers. The organization would develop and encourage the use of techniques to provide reliable research data through education, standards, publications and similar methods.

(c) The Commission cautioned that great care must be used in implementing the plan to avoid its becoming illegally coercive on market data researchers or the users of that information and that participation must be voluntary with membership open to all who are eligible.

[38 FR 28280, Oct. 12, 1973]

§ 15.479 Cumulative annual rebate plan disapproved.

(a) The Commission issued an advisory opinion on January 11, 1973 (File No. 733 7003), to the effect that a proposed cumulative refund plan probably would violate the Robinson-Patman Act.

(b) Under the plan, the company's distributors could earn a refund on amounts paid the company if a distributor increased his quarterly purchases over those of the previous year. All of the firm's distributors would be enrolled and advised as to how the plan would operate. The percentage of annual refund would rise as sales increased, the greater percentage by which sales increased, the greater the percentage refund.

(c) The Commission advised that the price discrimination, which would necessarily result from implementation of the plan, may have the effect of substantially lessening competition among the distributors because the plan arbitrarily categorized distributors on the basis of a percentage increase in sales bearing no relationship to the company's lower cost in doing business with a distributor.

(d) The Commission further advised that a legally inoffensive incentive plan might be devised in which all of those with an increase in volume over a given base period would receive the same percentage refund and new entrants would be allowed to qualify.

[38 FR 28280, Oct. 12, 1973]

§ 15.480 Commission declines to issue advisory opinion.

(a) The Commission declined to issue an advisory opinion on February 9, 1973 (File No. 733 7004), as to whether a loosely woven cotton cloth, impregnated with wax, falls within the purview of the Flammable Fabrics Act, the Fair Packaging and Labeling Act, or the Textile Fiber Products Identification Act, or whether any of the marketing and labeling plans with respect to this product violate the Federal Trade Commission Act.

(b) The cloth is to be used in making master patterns for clothing, upholstery, etc. When heated to a temperature of 130 to 150 degrees Fahrenheit, the cloth becomes pliable and may be molded to the body or to any other contoured surface. After it is cooled, it can be removed, flattened by making appropriate slits in the material, and used as a model for a paper pattern.

(c) It was proposed that the cloth would be sold to amateur, professional and industrial users in roll form or on bolts in the same manner as other yard goods. The cloth would be distributed to existing yard goods and sewing center retailers through established commercial representatives. Some would inventory the cloth and supply retailers within their territories; others might solicit orders for acceptance by the manufacturer.

(d) The Commission advised that since the marketing aspects of the proposed plan were not explained in sufficient detail to provide the basis for issuance of an advisory opinion, the request was inappropriate under § 1.1(c) of the Commission's Rules of Practice.

[38 FR 28281, Oct. 12, 1973]

§ 15.481 Proposed acquisition.

(a) The Commission issued an advisory opinion on February 12, 1973 (File No. 733 7002), to the effect that a proposed acquisition of a producer of chemical products by another producer of chemical products would not warrant an investigation if the acquisition were made.

(b) The corporation to be acquired manufactured industrial resins as did the acquirer but their products were not competitive. They were suppliers to each other of raw materials worth less than $500,000 in sales to each per annum.

(c) The acquiring corporation desired to make the acquisition in order to improve its research capability in the field of hydrocarbon resins. There are numerous strong domestic, as well as foreign, competitors engaged in the production and sale of hydrocarbon resins.

(d) The Commission cautioned that it might initiate an investigation if it later had reason to believe substantial adverse effects, attributable to the acquisition, have resulted or that they probably would result.

[38 FR 28281, Oct. 12, 1973]

§ 15.482 Wholly-owned subsidiary may not collect consumer indebtedness without identifying the parent company as owner.

The Commission issued an advisory opinion on May 16, 1973 (733 7005), to the effect that creation of a wholly-owned subsidiary to collect consumer indebtedness without identifying the parent company as the owner of the collection agency would violate the Commission's Guides Against Debt Collection Deception (16 CFR Part 237). The Guides prohibit misrepresenting that debts have been turned over to an independent organization engaged in the business of collecting accounts.

[38 FR 28281, Oct. 12, 1973]

§ 15.483 "Blackhaul" allowances advisory opinion affirmed.

(a) The Commission has completed reconsideration of its advisory opinion on "blackhaul" allowances (16 CFR 15.147; 32 FR 14694, October 24, 1967) and concluded that it should not be rescinded.

(b) The Commission announced that:

(1) It intends to scrutinize delivered price systems in the food products industry in order to determine whether such systems are unfair to customers or to ultimate consumers, in violation of section 5 of the Federal Trade Commission Act.

(2) It intends to develop empirical information on the impact on food prices of delivered pricing systems which will enable it to make this determination.

(3) It is taking this action in view of representations made by interested parties, including the Cost of Living Council.

(4) It is of the view that questions probably would not arise under the laws it administers if sellers, using valid uniform, zone delivered pricing systems, offer to all customers, on a

nondiscriminatory basis, in lieu of a delivered price, the option of purchasing at a true f.o.b. shipping point price.

[39 FR 1260, Jan. 7, 1974, 39 FR 6696, Feb. 22, 1974]

§ 15.484 Foreign ownership or control of a corporation in a Webb-Pomerene Association.

The Commission issued an advisory opinion on December 6, 1973 (File No. 743 7001), to the effect that membership in an export (Webb-Pomerene) association by a United States corporation, which is owned or controlled by foreign interests, in and of itself, would not violate the laws administered by the Commission.

[39 FR 3820, Jan. 30, 1974]

§ 15.485 Location of debt collection agency office.

The Commission issued an advisory opinion on December 19, 1973 (743 7002), to the effect that a debt collection agency properly could locate its offices on or adjacent to the premises of its clients. Since the agency would make every effort to disclose its separate identity by placing its corporate name on the entrances to the office, notices sent and stationery used, the Commission concluded that its Guides Against Debt Collection Deception (16 CFR Part 237) would be observed and that debtors would not be deceived.

[39 FR 21046, June 18, 1974]

§ 15.486 Averaging individual profit and loss statements in reports to association members.

The Commission issued an advisory opinion on February 22, 1974 (743 7003), to the effect that an accountant for a group of about fifteen companies properly could compile and distribute an average profit and loss statement for the companies provided the individual firms' reporting data was kept strictly confidential and only disclosed as a part of the average figures. The Commission added that the plan must not be used to secure adherence to prices, quotas of production, quotas of sales or to create other unlawful trade restraints.

[39 FR 21046, June 18, 1974]

§ 15.487 Collecting and reporting statistical information from members of an association.

The Commission issued an advisory opinion on March 7, 1974 (743 7004), to the effect that an association properly could collect data and report aggregate figures on production, purchases, shipments, inventory, and unfilled or open orders, provided the collection was handled by an independent accounting firm. Individual firm's data would not be disclosed and no data on prices, future projections or estimates would be collected. The Commission commented that the program must not be used to secure adherence to prices, quotas or production, quotas of sales or to create other unlawful trade restraints.

[39 FR 21046, June 18, 1974]

§ 15.488 Association by-laws regarding membership may not be arbitrary or discriminatory.

The Commission issued an advisory opinion on March 8, 1974 (743 7005), to the effect that an association's constitution and by-laws should not provide for arbitrary or discriminatory bars to membership to a qualified applicant or to arbitrary or discriminatory dismissal of a member Membership in the association might be a vital competitive factor in the industry.

[39 FR 21046, June 18, 1974]

§ 15.489 Refund must be offered to subscribers to discontinued magazine.

The Commission issued an advisory opinion on March 4, 1974 (743 7006), to the effect that subscribers to a discontinued magazine should be notified by letter and allowed at least three weeks to choose between a refund and a subscription to a substitute magazine. The Commission added that those who made no choice should be deemed to have elected to receive a refund.

[39 FR 21046, June 18, 1974]

§ 15.490 Drop shipments proper when warehouse distributor does not stock item.

The Commission issued an advisory opinion on April 1, 1974 (Dkt. 6889), to the effect that the utilization of drop shipments for initial stock orders and very heavy equipment would not be violative of the cease and desist order provided the products are not normally stocked by warehouse distributors. The Commission added that drop shipments would not be permissible if the items normally were stocked by warehouse distributors.

[39 FR 21046, June 18, 1974]

§ 15.491 Association may prepare dealer's catalog provided no price information is included.

The Commission issued an advisory opinion on April 5, 1974 (Dkt. 5979), to the effect that sponsorship by an association of individualized catalogs to be used by dealer members of the association showing products, the name of the manufacturer, a description of the product and a number for ordering purposes would not be violative of the cease and desist order. A dealer would select the pages for his catalogs, could have his name printed on the cover and overprints on pages to show his name, address and phone number. No price information would be in the catalogs; any manufacturer could arrange to have pages printed for his products; and the catalog also could be ordered by nonmembers of the association.

[39 FR 21046, June 18, 1974]

SUBCHAPTER B—GUIDES AND TRADE PRACTICE RULES

PART 17—APPLICATION OF GUIDES IN PREVENTING UNLAWFUL PRACTICES

Note: Industry guides are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. They provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry. Failure to comply with the guides may result in corrective action by the commission under applicable statutory provisions. Guides may relate to a practice common to many industries or to specific practices of a particular industry.

(Sec. 6(g), 38 Stat. 722; (15 U.S.C. 46(g))

[44 FR 11176, Feb. 27, 1979]

PART 18—GUIDES FOR THE NURSERY INDUSTRY

Sec.

18.0 Definitions.
18.1 Deception (general).
18.2 Deception through use of names.
18.3 Substitution of products.
18.4 Size and grade designations.
18.5 Deception as to blooming, fruiting, or growing ability.
18.6 Plants collected from the wild state.
18.7 Misrepresentation as to character of business.
18.8 Deception as to origin or source of industry products.

Authority: Secs. 6, 5, 38 Stat. 721, 719; 15 U.S.C. 46, 45.

Source: 44 FR 11177, Feb. 27, 1979, unless otherwise noted.

§ 18.0 Definitions.

Industry products. As used in this part, the term "industry products" includes all types of trees, small fruit plants, shrubs, vines, ornamentals, herbaceous annuals, biennials and perennials, bulbs, corms, rhizomes, and tubers which are offered for sale or sold to the general public. Included are products propagated sexually or asexually and whether grown in a commercial nursery or collected from the wild state. Such products are customarily used for outdoor planting. Not included are florists' or greenhouse plants solely for inside culture or use and annual vegetable plants.

Industry members. Any person, firm, corporation, or organization engaged in the sale, offering for sale, or distribution in commerce of industry products, as defined above.

Lining-out stock. Includes all plant material coming from propagating houses, beds, or frames, and young material such as seedlings rooted or unrooted cuttings, grafts or layers, of suitable size to transplant either in the nursery row or in containers for "growing on."

Nursery-grown stock. Plants propagated and grown under cultivation, or plants transplanted from the wild and grown under cultivation for at least one full growing season.

§ 18.1 Deception (general).

(a) It is an unfair trade practice to sell, offer for sale, or distribute industry products by any method, or under any circumstance or condition, which has the capacity and tendency or effect of deceiving pruchasers or prospective purchasers as to quantity, size, grade, kind, species, age, maturity, condition, vigor, hardiness, number of times transplanted, growth ability, growth characteristics, rate of growth or time required before flowering or fruiting, price, origin or place where grown, or in any other material respect.

(b) The inhibitions of this section shall apply to every type of advertisement or method of representation, whether in newspaper, periodical, sales catalog, circular, by tag, label or insignia, by radio or television, by sales representatives, or otherwise.

(c) Among practices inhibited by the foregoing are direct or indirect representations:

(1) That plants have been propagated by grafting or bud selection methods, when such is not the fact.

(2) That industry products are healthy, will grow anywhere without the use of fertilizer, or will survive and produce without special care, when such is not the fact.

(3) That plants will bloom the year round, or will bear an extraordinary

number of blooms of unusual size or quality, when such is not the fact.

(4) That an industry product is a new variety, when in fact it is a standard variety to which the industry member has given a new name.

(5) That an industry product cannot be purchased through usual retail outlets, or that there are limited stocks available, when such is not the fact.

(6) That industry products offered for sale will be delivered in time for the next (or any specified) seasonal planting when the industry member is aware of factors which make such delivery improbable.

(7) That the appearance of an industry product as to size, color, contour, foliage, bloom, fruit or other physical characteristic is normal or usual when the appearance so represented is in fact abnormal or unusual.

(8) That the root system of any plant is larger in depth or diameter than that which actually exists, whether accomplished by excessive packaging material, or excessive balling, or other deceptive or misleading practice.

(9) That bublets are bulbs.

(10) That an industry product is a rare or unusual item when such is not the fact. [Guide 1]

§ 18.2 Deception through use of names.

(a) In the sale, offering for sale, or distribution of an industry product, it is an unfair trade practice for any industry member to use a name for such product which has the capacity and tendency or effect of deceiving purchasers or prospective purchasers as to its true identity.

(b) Subject to the foregoing: (1) When an industry product has a generally recognized and well-established common name, it is proper to use such name as a designation therefor, either alone or in conjunction with the correct botanical name of the product.

(2) When an industry product has a generally recognized and well-established common name, it is an unfair trade practice for an industry member to adopt and use a new name for the product unless such new name is immediately accompanied by the generally recognized and well-established common name, or by the correct botanical name, or by a description of the nature and properties of the product which is of sufficient detail to prevent confusion and deception of purchasers or prospective purchasers as to the true identity of the product.

(3) When an industry product does not have a generally recognized and well-established common name, and a name other than the correct botanical name of the product is applied thereto, such other name shall be immediately accompanied by either the correct botanical name of the product, or a description of the nature and properties of the product which is of sufficient detail as to prevent confusion and deception of purchasers and prospective purchasers as to the true identity of the product.

NOTE: *Industry recommendation.* The industry recommends that in administering the guide in this section the Commission give consideration to the use of plant names listed in such works as Checklist of Woody Ornamenatal Plants of California, 1977, University of California; Hillier's Manual of Trees and Shrubs, 1971, Hillier & Sons; Manual of Cultivated Conifers, 1965, P. Den Ouden & B. K. Boom; Hortus III, 1976, L. H. Bailey Hortorium; Naming and Registering New Cultivars, 1974, American Association of Nurserymen, Inc.; and to plant name lists periodically published by the plant societies and the horticultural organizations selected as international and national cultivar registration authorities as enumerated in Appendix of Naming and Registering New Cultivars. [Guide 2]

§ 18.3 Substitution of products.

With respect to industry products offered for sale by an industry member, it is an unfair trade practice for any member of the industry:

(a) To ship or deliver industry products which do not conform to representations made prior to securing the order or to specifications upon which the sale is consummated, without advising the purchaser of the substitution and obtaining his consent thereto prior to making shipment or delivery, where such practice has the capacity and tendency or effect of misleading or deceiving purchasers or prospective purchasers; or

(b) To falsely represent the reason for making a substitution: *Provided, however,* That nothing in this section is intended to inhibit the shipment of products different from those ordered, prior to obtaining the purchaser's consent to such substitution, when the order is received by the industry member near the close of the planting season for the products ordered and the substitution involved relates but to a product or products the total price of which is comparatively small, and when:

(1) At the commencement of the planting season for the products ordered the industry member had a supply of such products sufficient to meet normal and reasonably expected orders therefor, and such supply has been exhausted; and

(2) The products substituted are of similar variety and of equal or greater value to those ordered by the purchaser and no additional charge is made therefor; and

(3) Notice of the substitution, with adequate identification of the substituted item or items, and with commitment of the industry member to refund any purchase price received for the substituted products if such products are not acceptable to the purchaser and to compensate the purchaser for any expense involved in the return of the substituted products if refund is conditioned on the return thereof, is given the purchaser at the time of his receipt of such products: *And provided further*, That nothing in this section is to be construed as sanctioning the dissemination of an advertisement of an industry product or products or the personal solicitation of orders therefor unless at the time of such dissemination or solicitation the industry member has a supply of such product or products sufficient to meet normal and reasonably expected orders therefor. [Guide 3]

§ 18.4 Size and grade designations.

(a) In the sale, offering for sale, or distribution of industry products, it is an unfair trade practice for an industry member to use any term, designation, number, letter, mark or symbol, as a size or grade designation for any industry product in a manner or under any circumstance having the capacity and tendency or effect of deceiving purchasers or prospective purchasers with respect to the actual size or grade of such products.

(b) Under this section industry members offering lining-out stock for sale shall specify conspicuously and accurately the size and age of such stock when failure to do so has the capacity and tendency or effect of deceiving purchasers or prospective purchasers.

(c) Nothing in this section is to be construed as inhibiting the designation of the size or grade of an industry product by use of a size or grade designation for which a standard has been established which is generally recognized in the industry when the identity of such standard is conjunctively disclosed, the product qualifies for the designation under such standard, and no deception of purchasers or prospective purchasers results in the use of such designation.

NOTE: It is the consensus of the industry that the grade and size standard set forth in the current edition of American Standard for Nursery Stock, ANSI Z60.1, as approved by the American National Standard Institute, Inc., is generally recognized in the industry, and that use of the size and grade designation therein set forth, in accordance with the requirements of the standard for the designations, in the marketing of industry products to which such standard relates, will prevent deception and confusion of purchasers and prospective purchasers of such products. [Guide 4]

§ 18.5 Deception as to blooming, fruiting, or growing ability.

In the sale, offering for sale, or distribution of industry products, it is an unfair trade practice for any industry member to deceive purchasers or prospective purchasers as to the ability of such products:

(a) To bloom, flower, or fruit within a specified period of time; or

(b) To produce crops within a specified period of time, or to give multiple crops each year, or to produce crops in unfavorable climatic regions; or

(c) To bear fruit through self-pollinization; or

(d) To grow, flourish, and survive irrespective of the climatic conditions, the care exercised in or after planting, or the soil characteristics of the locality in which they are to be planted.

NOTE 1: Under this section, when flower bulbs are of such immaturity as not reasonably to be expected to bloom and flower the first season of their planting, such fact shall be clearly and conspicuously disclosed in all advertisements and sales promotional literature relating to such products: *Provided, however*, That such disclosure need not be made when sales are confined to nurseries and commercial growers for their use as planting stock.

NOTE 2: Under this section, in order to avoid deception of purchasers and prospective purchasers thereof, when rose bushes have been used in a greenhouse for the commercial production of cut flowers, they shall be tagged or labeled so as to clearly, adequately and conspicuously disclose such fact, and such tags and labels shall be so attached thereto as to remain thereon until consummation of consumer sale. A similar disclosure shall be made in all advertising and sales promotional literature relating to such products. And when, by reason of such previous greenhouse use or their condition at the time of removal therefrom or their handling during or subsequent thereto, there is probability that such rose bushes will not satisfactorily thrive and produce flowers when replanted outdoors, or will satisfactorily thrive and produce flowers outdoors only if given special treatment and attention during and after their replanting, such fact shall also be clearly, conspicuously, and nondeceptively disclosed in close conjunction with, and in the same manner as, the aforesaid required disclosure that such products have been used in a greenhouse for the commercial production of cut flowers. [Guide 5]

§ 18.6 Plants collected from the wild state.

It is an unfair trade practice to sell, offer for sale, or distribute industry products collected from the wild state without disclosing that they were collected from the wild state: *Provided, however*, That if collected plants are grown in the nursery row for at least one growing season before being marketed, such disclosure is not required. [Guide 6]

§ 18.7 Misrepresentation as to character of business.

(a) In the sale, offering for sale, or distribution of industry products, it is an unfair trade practice for any industry member to represent or imply that he is a grower or propagator of such products or any portion thereof, or that he has any other experience or qualification either relating to the growing or propagation of such products or which enables him to be of assistance to purchasers or prospective purchasers in the selection by them of the kinds or types of products or the placement thereof when such is not the fact, or in any other manner to misrepresent the character, nature, or extent of his business.

NOTE: Among practices subject to the inhibitions of this section are representations by an industry member to the effect that he is a landscape architect when his training, experience, and knowledge do not qualify him for such representation.

(b) It is also an unfair trade practice for an industry member to use the word "guild," "club," "association," "council," "society," "foundation," or any other word of similar import or meaning, as part of a trade name, or otherwise, in such a manner or under such circumstances as to indicate or imply that his business is other than a commercial enterprise operated for profit, unless such be true in fact, or so as to deceive purchasers or prospective purchasers in any other material respect. [Guide 7]

§ 18.8 Deception as to origin or source of industry products.

(a) It is an unfair trade practice to sell, offer for sale, or advertise an industry product under any representation which has the capacity and tendency or effect of deceiving purchasers or prospective purchasers as to the origin or source of such product (e.g., by use of the term "Holland" to describe bulbs which were grown in the U.S.A.): *Provided, however*, That when a plant has an accepted common name which incorporates a geographical term and such term has lost its geographical significance as so used, the mere use of such common names does not constitute a misrepresentation as to source or origin (e.g., "Colorado Blue Spruce," "Arizona Cypress," "Black Hills Spruce," "California Privet," "Japanese Barberry," etc.).

(b) It is also an unfair trade practice to advertise, sell, or offer for sale an industry product of foreign origin without adequate and nondeceptive disclosure of the name of the foreign country from which it came, where the failure to make such disclosure has the capacity and tendency or effect of deceiving purchasers or prospective purchasers. [Guide 8]

PART 19—GUIDES FOR THE METALLIC WATCH BAND INDUSTRY

Sec.
19.0 The industry and its products defined.
19.1 Deception (general).
19.2 Deception as to metallic content.
19.3 Misuse of "corrosion proof," "noncorrosive," "corrosion resistant," "rust proof," "rust resistant," etc
19.4 Deception as to origin or place of manufacture.

AUTHORITY: Secs. 6, 5, 38 Stat. 721, 719; 15 U.S.C. 46, 45.

SOURCE: 44 FR 11179, Feb. 27, 1979, unless otherwise noted.

§ 19.0 The industry and its products defined.

Members of this industry are persons, firms, corporations, or organizations which engage in the manufacture, sale, offering for sale or distribution of industry products as the term "industry products" is defined in the paragraph which immediately follows. The term "industry products," as used in the foregoing paragraph and in the following rules, includes any kind of metallic wrist bands which are designed for holding wrist watches to the wrists of human beings and which are not permanently attached to the cases of such watches.

§ 19.1 Deception (general).

(a) It is an unfair trade practice for any industry member to sell or offer for sale any industry product under any representation, circumstance, or condition having the capacity and tendency or effect of deceiving purchasers or prospective purchasers in any material respect.

(b) The prohibitions of this section are applicable to all forms of advertising, whether in periodicals, on the radio or television, and whether written or oral, and to any form of marking or labeling of the products, or their containers or display cards. [Guide 1]

§ 19.2 Deception as to metallic content.

(a) In the sale, offering for sale, or distribution of industry products, it is an unfair trade practice to:

(1) Misrepresent the kind, quantity, quality, fineness, thickness, or manner of application, of any metal or metal alloy contained in an industry product or part thereof; or

(2) Fail to adequately and nondeceptively disclose the metallic composition of an industry product, or part thereof, which has an exposed surface of the appearance of gold and is not throughout of pure (24 Kt.) gold.[1]

(3) Use the words "gold," "karat," "carat," "silver," "solid silver," "sterling," "sterling silver," "coin," "coin silver," "platinum," "iridium," "palladium," "ruthenium," "rhodium," or "osmium," or any abreviation thereof, either alone or in conjunction with the words "plated," "plate," "filled," "overlay," "electroplate," "electroplated" or any abbreviation thereof, except in accord with requirements and provisions relating thereto which are hereinafter set forth.

(b) Use of "Silver," "Solid Silver," "Sterling," "Sterling Silver," "Coin," and "Coin Silver": Industry products or parts thereof shall not be marked, described, or otherwise represented as being "silver," "solid silver," "sterling" or "sterling silver," unless they are throughout of silver of not less than 925/1000ths fineness. Nor shall they be marked, described, or otherwise represented as being "coin" or "coin silver" unless they are throughout of silver of not less than 900/1000ths fineness. The terms "sterling" and "coin" shall not be used as a marking on, or as descriptive of, products or parts which are of base metal on a surface or surfaces of which there has been applied a plating or coating of silver. When an industry product or part is marked or described as "silver plated" or "silver plate," all significant surfaces thereof shall have a plating or coating of silver of a high degree of fineness, and such plating or coating shall be of substantial thickness. Abbreviations of any of the mentioned terms are to be regarded as subject to the same requirements. (Additional requirements for use of these terms as markings on products are set forth in paragraph (g) of this section.)

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[1] Such disclosure shall be in the form of a legible and permanent marking on the product which is so positioned, and of such conspicuousness, as to conform with the requirements relating to quality markings which are set forth in paragraph (g) of this section. When the composition is wholly of a base metal having the appearance of gold, the marking may be either "Base Metal" or by use of a generally understood identification of the kind of base metal present (such as, "Anodized Aluminum"; "Brass"; etc.). When of a base metal having a surface plating or coating of gold alloy, a marking of "Gold Filled", "Gold Plated", "Gold Plate", "Gold Overlay", "Rolled Gold Plated", "Rolled Gold Plate", "Gold Electroplated", "Gold Electroplate", "Heavy Gold Electroplated", or "Heavy Gold Electroplate", will be considered adequate when the use of such term is in full accord with the respective requirements and provisions relating thereto which are set forth in paragraphs (d), (e), (f), and (g), of this section.

(c) Use of "Platinum," "Iridium," "Palladium," "Rhodium," "Ruthenium," and "Osmium": These words, and their abbreviations, shall not be used in any manner, or under any circumstance or condition, having the capacity and tendency or effect of deceiving purchasers or prospective purchasers as to the true metallic composition of an industry product or part thereof.

NOTE: Commercial Standard, CS66-38, issued by the National Bureau of Standards of the U.S. Department of Commerce, covers the marking of articles made wholly or in part of platinum, and markings on industry products which are in compliance with applicable provisions of said CS66-38 and the additional requirements of paragraph (g) of this section, will be considered as proper.

(d) Use of "Gold," "Karat," "Carat," "Gold Filled," "Gold Plated," "Gold Plate," "Gold Overlay," "Rolled Gold Plated," "Rolled Gold Plate," "Gold Electroplated," "Gold Electroplate," "Heavy Gold Electroplated," and "Heavy Gold Electroplate": Industry members shall not use any of these words or terms, or any abbreviations thereof, under any circumstances or condition, or in any manner, which has the capacity and tendency or effect of deceiving purchasers or prospective purchasers as to presence of gold or gold alloy in any industry product or part thereof, or as to the extent or fineness of gold or gold alloy in any industry product or part thereof, and shall regard, as among the practices prohibited, the following:

(1) Use of the unqualified word "Gold," or any abbreviation thereof, as descriptive of any industry product, or part thereof, which is not composed throughout of fine (24 karat) gold.

(2) Use of the word "Gold," or any abbreviation thereof, as descriptive of any industry product, or part thereof, which is composed throughout of an alloy of gold, unless a correct designation of the karat fineness of the alloy immediately precedes the word "Gold," or abbreviation thereof, and such fineness designation is of at least equal conspicuousness therewith.

(3) Use of the word "Gold," or any abbreviation thereof, as descriptive of any industry product, or part thereof, which is not composed throughout of gold or gold alloy, but is surface-plated or coated with gold alloy, unless the word "Gold," or abbreviation thereof, is so qualified as adequately and nondeceptively to disclose that the product or part is but surface-plated or coated with an alloy of gold; and, when such plating has been mechanically applied, unless such word "Gold," or abbreviation thereof, is immediately preceded by a correct designation of the karat fineness of the alloy and such fineness designation is of at least equal conspicuousness therewith.

NOTE: See acceptable forms of markings and descriptions for such products set out in paragraph (e)(2) of this section.

(4) Use of the terms "Gold Filled," "Rolled Gold Plate," "Rolled Gold Plated," "Gold Overlay," "Gold Plated," or "Gold Plate," as descriptive of an industry product or part thereof, unless such product or part contains a surface-plating of gold alloy applied by a mechanical process which is of such thickness and extent of surface coverage that use of the term as descriptive of the product or part will not have the capacity and tendency of deceiving purchasers or prospective purchasers, and unless the term is immediately preceded by a correct desig-

nation of the karat fineness of the alloy and such designation is of at least equal conspicuousness as the term used.

Note: See acceptable forms of markings and descriptions for such products set out in paragraph (e)(2) of this section.

(5) Use of the term "Gold Electroplate," or "Gold Electroplated," as descriptive of any industry product or part thereof, unless such product or part is plated or coated with gold or a gold alloy and such plating or coating is of such karat fineness, thickness, and extent of surface coverage that the use of the term will not have the capacity and tendency of deceiving purchasers or prospective purchasers.

Note: See acceptable forms of markings and descriptions for such products set out in paragraph (e)(3) of this section.

(6) Representing, directly or by implication, by use of any name, terminology, or otherwise, that an industry product is equal or superior to, or different than, a known and established type of industry product with reference to its gold content or method of manufacture, unless the representation is true in fact (namely, that it is equal or superior to or different than the established type in the respects represented or implied).

Note 1: Requirements for use of the word "Gold," or any abbreviation thereof, as above set forth, are applicable to "Duragold," "Diragold," "Noblegold," "Goldine," or any words or terms of similar import.

Note 2: See also paragraph (g) of this section entitled "Additional Requirements Relating to Markings."

(e) Markings and descriptions of industry products or parts thereof will be considered as proper when meeting applicable requirements of paragraph (g) of this section and in conformity with the following:

(1) An industry product or part thereof composed throughout of an alloy of gold of not less than 10 karat fineness may be marked and described as "Gold" when such word "Gold," wherever appearing, is immediately preceded by a correct designation of the karat fineness of the alloy and such karat designation is of equal conspicuousness as the word "Gold" (as, for example, "14 Karat Gold"; "14 K. Gold"; and "14 Kt. Gold"). Such a product may also be marked and described by a designation of the karat fineness of the gold alloy unaccompanied by the word "Gold" (as, for example, "14 Karat," "14 Kt.," and "14 K.").

Note: When the term "Gold," or any abbreviation thereof, is used as descriptive of any product or part of a product which is composed throughout of gold alloy but contains a concealed hollow center or interior, the term or its abbreviation shall also be immediately accompanied by a disclosure of the fact that the product or part contains a hollow center or interior (as, for example, "14 Karat Gold-hollow Center" and "14 K. Gold Tubing," when of a gold alloy tubing of such a karat fineness), when the failure to make such disclosure has the capacity and tendency or effect of deceiving purchasers or prospective purchasers. Such products must not be marked or described as "solid" or as being solidly of gold or of a gold alloy. For example, though the composition of such product is 14 karat gold alloy, it shall not be described or marked as either "14 Kt. Solid Gold" or as "Solid 14 Kt. Gold."

(2) An industry product or part thereof on which there has been affixed on all significant surfaces, by soldering, brazing, welding, or other mechanical means, a plating of gold alloy of not less than 10 karat fineness which is of substantial thickness [2] may be marked or described as "Gold Filled," "Gold Plate," "Gold Plated," "Gold Overlay," "Rolled Gold Plate," or adequate abbreviations thereof, when such plating constitutes at least 1/20th of the weight of the metal in the entire article, and when the term is immediately preceded by a designation of the karat fineness of the plating which is of equal conspicuousness

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[2] As here used, the term "substantial thickness" is to be construed as requiring that all areas of the plating be of such thickness as to assure of a durable coverage of the base metal to which it has been affixed. Since industry products embrace items having surfaces and parts of surfaces which are subject to different degrees of wear, this requirement of substantial thickness may not necessitate uniformity of thickness of plating for all items or for different areas of the surface or surfaces of individual items.

as the term used (as, for example, "14 Kt. Gold Filled," "14 Kt. G.F.," "14 Kt. Gold Plated," "14 Kt. G.P.," and "14 Kt. Gold Overlay"). When conforming to all such requirements except the specified minimum 1/20th of the weight of the metal in the entire article, the terms "Gold Plate," "Gold Plated," "Rolled Gold Plate," and "Gold Overlay" may be used when the karat fineness designation is immediately preceded by a fraction which accurately discloses the portion of the weight of the metal in the entire article accounted for by the plating, and when such fraction is of equal conspicuousness as the term used (as, for example, "1/40 12 Kt. Rolled Gold Plate," and "1/40 12 Kt. R.G.P.").

Examples of Proper Markings for Expansion Bands of Specified Composition and Construction. A substantial portion of metallic watch bands are of the expansion type and consist of a skeleton (containing links, springs, rivets, and other small parts) of a base metal; top caps and end pieces which are of a base metal and to the exterior surfaces of which there have been affixed, by a mechanical process, platings of yellow gold alloy of 10 karat fineness; and bottom caps which are of stainless steel and which do not have the appearance of yellow gold.

When such platings of the top caps and end pieces are of substantial thickness and account for not less than 1/20th of the total weight of the base metal and gold alloy in each such cap and end piece, a proper marking on the band would be:

"10 Karat Gold Filled Top Caps and End Pieces

"Stainless Steel Bottom Caps"

or

"10 K.G.F. Top Caps and End Pieces"

or

"10 K.G.F. Top Caps"

and when such platings of the top caps and end pieces are of substantial thickness and account for 1/30th of the total weight of the base metal and gold alloy in each such top cap and end piece, a proper marking on the band would be:

"1/30 10 Karat Rolled Gold Plate Top Caps and End Pieces—Stainless Steel Bottom Caps"

or

"1/30 10 K.R.G.P. Top Caps and End Pieces"

or

"1/30 10 K.R.G.P. Top Caps"

Provided, however, That the size and placement of any such markings shall conform to the requirements of paragraph (g) of this section.

NOTE: When the plated top caps are affixed, by swedging or otherwise, to a base metal reinforcement lining, the weight of such lining shall be included in the weight used for determining the weight ratio and proper term to be used.

(3) An industry product or part thereof, all significant surfaces on which there has been affixed by an electrolytic process a coating or plating of gold, or of a gold alloy of not less than 10 karat fineness, the minimum thickness throughout of which is equivalent to 7/1,000,000ths of an inch of fine gold, may be marked or described as "Gold Electroplate" or "Gold Electroplated." When the coating or plating meets the minimum fineness, but not the minimum thickness, above specified, the marking or description may be "Gold Flashed" or "Gold Washed," and when the minimum fineness above specified and of a minimum thickness throughout which is equivalent to 100/1,000,000ths of an inch of fine gold, the marking or description may be "Heavy Gold Electroplate" or "Heavy Gold Electroplated." When coatings or platings qualify for the term "Gold Electroplate" (or "Gold Electroplated"), or the term "Heavy Gold Electroplate" (or "Heavy Gold Electroplated"), and have been applied by use of a special kind of electrolytic process, the designation for which the coating or plating is qualified may be accompanied by an identification of the process used, as for example, "Gold Electroplated (X Process)"; "Heavy Gold Electroplated (Y Process)."

(f) Tolerances and exemptions: The requirements of this section relating to markings and descriptions of industry products and parts thereof are subject to the tolerances applicable thereto under the National Stamping Act (15 U.S. Code, sections 294, et seq.). Such requirements are also subject to exemptions applicable thereto under section 10(a) of Commercial Standard CS 67-38, relating to articles made of karat gold, and under section 12(a) of Commercial Standard CS 47-34, relating to articles having mechanically-applied surface platings of gold alloy; and also to the exemptions applicable thereto enumerated in section 8 of Commercial Standard CS 118-44 (relating to marking of Jewelry and Novelties of Silver) and section 8(a) of Commercial Standard CS 51-35 (relating to marking of articles made of silver in combination with gold).

(g) Additional requirements relating to markings. As used in this paragraph, the term "quality marking" means any marking on an industry product which indicates or suggests that the product contains precious metal or an alloy thereof. Included are the words "gold", "karat", "carat", "duragold", "diragold", "noblegold", "goldine", "silver", "sterling", "coin", "coin silver", "platinum", "iridium", "palladium", "ruthenium", "Rhodium", and "osmium", and any abbreviation of any such word, whether used alone or in conjunction with such terms as "filled", "plated", "overlay", "electroplated", or any abbreviation thereof.

(1) *Markings to be legible, conspicuous, and of adequate permanency.* Quality markings on industry products shall be legible and of such degree of permanency as to remain on the products until consummation of consumer sale thereof. They shall also be of such size and conspicuousness as to likely be observed and read by purchasers and prospective purchasers making casual inspection of the products: *Provided, however,* That when markings of such size and conspicuousness would seriously impair the appearance of the product, they may be of less size and conspicuousness if also appearing on a tag or label attached or affixed to the product in such a manner as to remain thereon until consummation of consumer purchase and of such size and conspicuousness as to be likely observed and read by purchasers and prospective purchasers. When the marking on or attached to the product is concealed or obscured because of the manner in which the product is packaged, or mounted in a container or on a display card, and is offered for consumer sale in such form with consequence of likely deception of purchasers or prospective purchasers as to the true metallic composition of the product, the marking shall also appear on the outside of the packaging, or on the container or display card on which the product is mounted, in such a position as to be clearly applicable to the product and in such size and conspicuousness as to be likely observed and read by purchasers and prospective purchasers.

(2) *Deception by reason of difference in size of letters or words in the markings.* Words and letters in quality markings shall not appear in larger type than other words and letters in such markings when such size difference has the capacity and tendency or effect of deceiving purchasers or prospective purchasers as to the true metallic content of the product. (An example of such improper marking is where the product is marked as gold electroplate with the word "GOLD" in large type and the word "electroplate" in small type.)

(3) *When exposed parts are of similar appearance but of different composition.* When watch bands contain two or more parts having exposed surfaces of the same composition appearance but which in fact are of different composition, any marking as to the composition of one of such parts shall be accompanied by a disclosure of the composition of the other part or parts. Thus, when a band has top caps and end pieces of 14 karat yellow gold and bottom caps of yellow gold electroplate, a proper marking would be "14 K Gold Top Caps and End Pieces. Gold Electroplated Bottom Caps"; and when the top caps and end pieces are 14 karat white gold, and the bottom caps are of stainless steel which has the appearance of white gold, a proper marking would be "14 K. White Gold Top Caps and End Pieces. Stainless Steel Bottom Caps." [Guide 2]

§ 19.3 Misuse of "corrosion proof," "noncorrosive," "corrosion resistant," "rust proof," "rust resistant," etc.

(a) In the sale, offering for sale, or distribution of industry products, it is an unfair trade practice:

(1) To use the terms "corrosion proof," "noncorrosive," "rust proof," or any word or term of equivalent import, as descriptive of an industry product, unless all parts thereof will be immune from rust and other forms of corrosion during the life expectancy of the product; or

(2) To use the terms "corrosion resistant," "rust resistant," or any word or term of equivalent import, as descriptive of an industry product unless all parts of the product are of such composition as to not be subject to material damage by corrosion or rust during the major portion of the life expectancy of the product under normal conditions of use.

(b) Among the metals which may be considered as corrosion (and rust) resistant are:

Pure Nickel.
Gold Alloys of not less than 10 Kt. fineness.
Austenitic stainless steels. [Guide 3]

§ 19.4 Deception as to origin or place of manufacture.

In the sale, offering for sale, or distribution of industry products, it is an unfair trade practice:

(a) To misrepresent the origin or place of manufacture of an industry product or any part thereof; or

(b) Subject to the exemptions hereinafter specified, to fail to adequately disclose to purchasers and prospective purchasers that an industry product, or substantial part thereof [3] is of foreign origin, or has been manufactured, processed, or assembled in a foreign country.

NOTE 1: The disclosure required by paragraph (b) of this section shall be in the form of a legible marking or stamping on the industry product, or on a label or tag affixed thereto, which is of such degree of permanency as to remain on or attached to the product, in legible form, until consummation of the consumer sale thereof, and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making casual inspection of the product; and if such industry product is packaged, or mounted in a container, or on a display card, and is offered for consumer sale in such form, then the marking or stamping shall also appear on the front or face of such packaging, container, or display card, and be so positioned as to clearly have application to the product so packaged or mounted, and shall also be of such degree of permanency as to remain thereon until consummation of consumer sale of the product, and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making casual inspection of the product as so packaged or mounted. The disclosure shall name the foreign country of origin or manufacture, and when not applicable to the entire product shall specify the part or parts to which it has applicability.

Exemptions. To be regarded as exempt from the disclosure requirements of paragraph (b) of this section are:

Sheet, strip, wire, tubing, and similar basic material when imported in that form:

Parts of industry products which after their importation are subjected to processing or manufacturing in this country, or are merged with another or other parts of domestic manufacture, and as a consequence of such processing, manufacturing, or merger, no longer retain the appearance and essential characteristics possessed by them at the time of their importation.

NOTE 2: The affixing in this country of domestically manufactured caps and end pieces to imported skeletons of expansion type bands is not to be regarded as so changing the appearance and essential characteristics of such skeletons as to exempt them from the disclosure requirements of paragraph (b) of this section.

Rivets, springs, screws, bolts, washers, and similar small parts which are imported in an unassembled state;

Natural stones and cultured pearls which are used as decorative settings of industry products.

NOTE 3: Nothing in this section is to be construed as relieving any industry member from compliance with the requirements of custom laws of the U.S. having application to industry products and parts imported from a foreign country. [Guide 4]

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[3] Parts which are to be considered as substantial include the skeletons or interliners of the expansion type bands, whether of the entire length of the band or but a substantial portion of such length, and whether caps and end pieces are affixed thereto before or after the importation of such skeletons or interliners.

PART 20—GUIDES FOR THE REBUILT, RECONDITIONED AND OTHER USED AUTOMOBILE PARTS INDUSTRY

Sec.
20.0 Definitions.
20.1 Deception as to previous use of products.
20.2 Deception as to identity of rebuilder, remanufacturer, reconditioner or reliner.
20.3 Misrepresentation as to condition of products and misuse of the terms "rebuilt," "factory rebuilt," "remanufactured," etc.

AUTHORITY: Secs. 6, 5, 38 Stat. 721, 719; 15 U.S.C. 46, 45.

SOURCE: 44 FR 11182, Feb. 27, 1979, unless otherwise noted.

§ 20.0 Definitions.

Industry member. Any person, firm, corporation or organization engaged in the sale or distribution of any industry product as defined below.

Industry products. Industry products are automotive parts and automotive assemblies which have been used or which contain used parts, whether such parts or assemblies have been rebuilt, remanufactured, reconditioned, relined, or otherwise. The term "automotive assemblies" as herein used mean any part or assembly designed for an automobile, truck, motorcycle, tractor or similar self-propelled vehicle. Industry products include, but are not limited to, armatures, generators, starters, carburetors, clutches, distributors, connecting rods, crankshafts, cylinder blocks, engine assemblies, fuel pumps, brakes, master and wheel brake cylinders, power brakes, shock absorbers, starter drives, solenoids, automatic transmissions, regulators, spark plugs, springs, windshield wiper motors and water pumps. Automobile tires are not products of the industry.

§ 20.1 Deception as to previous use of products.

(a) It is an unfair trade practice to represent, directly or by implication, that any industry product is new or unused, or that any part of an industry product is new or unused when such is not the fact, or to misrepresent the extent of previous use thereof.

(b) It is an unfair trade practice for an industry member to offer for sale or sell any industry product unless a clear and conspicuous disclosure that such product has been used or contains used parts is made in all the industry member's advertising, sales promotional literature and invoices concerning the product, on the container in which the product is packed and if the product has been rebuilt, remanufactured, reconditioned or has the appearance of being new, on the product with sufficient permanency to remain thereon after installation for a reasonable period of time under ordinary conditions of use, and in such manner that said disclosure cannot be easily removed or obliterated.

(1) *Form of disclosure.* The disclosure that an industry product has been used or contains used parts as required by this section may be made by use of a word such as, but not limited to, "Used," "Secondhand," "Repaired," "Remanufactured," "Reconditioned," "Rebuilt," or "Relined," whichever is applicable to the product involved. On invoices to the trade only the disclosure required by this section may be made by use of any number, mark, or other symbol which is clearly understood by all purchasers receiving such invoices as meaning that the products, or parts thereof, identified on the invoices have been used.

(2) *Conspicuousness of disclosure.* The disclosure required by this section shall be of such size or color contrast and so placed as to be readily noticeable to purchasers or prospective purchasers reading advertising, sales promotional literature, or invoices containing same, or reading any representation as to content on the container in which an industry product is packed, or inspecting an industry product before installation, or with a minimum of disassembly after installation.

(c) It is an unfair trade practice to place any means or instrumentality in the hands of others whereby they may mislead purchasers or prospective purchasers as to the previous use of industry products or parts thereof. [Guide 1]

§ 20.2 Deception as to identity of rebuilder, remanufacturer, reconditioner or reliner.

(a) It is an unfair trade practice to misrepresent the identity of the rebuilder, remanufactures, reconditioner or reliner of an industry product.

(b) In connection with the sale or offering for sale of an industry product if the identity of the original manufacturer of the product, or the identity of the manufacturer for which the product was originally made, is revealed and the product was rebuilt, remanufactured, reconditioned or relined by other than the manufacturer so identified, it is an unfair trade practice to fail to disclose such fact wherever either of said manufacturers is identified in advertising and sales promotional literature concerning the product, on the container in which the product is packed, and on the product, in close conjunction with, and of the same permanency and conspicuousness as, the disclosure of previous use of the product required by this section. Examples of disclosures considered to be in compliance with the requirements of this section are as follows:

(1) Disclosure of the identity of the rebuilder as, for example:

Rebuilt by John Doe Co.

(2) Disclosure that the product was rebuilt by an independent rebuilder as, for example:

Rebuilt by an Independent Rebuilder

(3) Disclosure that the product was rebuilt by other than the manufacturer so identified as, for example:

Rebuilt by other than XYZ Motors

(4) Disclosure that the product was rebuilt for the identified manufacturer, if such is the case, as for example:

Rebuilt for XYZ Motors

[Guide 2]

§ 20.3 Misrepresentation as to condition of products and misuse of the terms "rebuilt," "factory rebuilt," "remanufactured," etc.

(a) It is an unfair trade practice to use, or cause or promote the use of, any statement or representation in advertising, on containers, on industry products, or elsewhere, which has the capacity and tendency or effect of misleading or deceiving purchasers or prospective purchasers as to the condition of an industry product, or the extent that an industry product has been repaired or reconstructed.

(b) It is an unfair trade practice to use the words "Rebuilt," "Remanufactured," or words of similar import, as descriptive of an industry product which, since it was last subjected to any use, has not been dismantled and reconstructed as necessary, all of its internal and external parts cleaned and made free from rust and corrosion, all impaired, defective or substantially worn parts restored to a sound condition or replaced with new, rebuilt[1] or unimpaired used parts, all missing parts replaced with new, rebuilt[1] or unimpaired used parts, and such rewinding or machining and other operations performed as are necessary to put the industry product in sound working condition.

(c) It is an unfair trade practice to represent an industry product as "Factory Rebuilt" unless the product was rebuilt as described in paragraph (b) of this section at a factory generally engaged in the rebuilding of such products. (See also § 20.2) [Guide 3]

PART 21—GUIDES FOR THE MIRROR INDUSTRY

Sec.
21.0 Definitions.
21.1 Deception (general).
21.2 Misrepresentation of kind or type of industry products.

AUTHORITY: Secs. 6, 5, 38 Stat. 721, 719; (15 U.S.C. 46, 45).

SOURCE: 44 FR 11183, Feb. 27, 1979, unless otherwise noted.

§ 21.0 Definitions.

As used in this part the terms "Industry Member" and "Industry Products" shall have the following meaning:

(a) *Industry member.* Any person, firm, corporation or organization (including manufacturers, wholesalers, jobbers, importers, retailers, etc.) engaged in the manufacture, sale, offering for sale, or distribution of industry products as defined below:

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[1] In accord with the provisions of this paragraph (b).

(b) *Industry products.* All kinds and types of mirrors both utilitarian and decorative.

(c) For the purposes of this part the following definitions shall apply:

Plate glass. A transparent glass, the two surfaces of which are flat and parallel so that they give clear and undistorted vision and reflection, manufactured either by floating hot glass in ribbon form upon a heated liquid of greater density than that of glass or by grinding and polishing a ribbon of glass formed between two rolls.

Window glass. A transparent glass which has been drawn or rolled, has glossy, fire polished surfaces and a characteristic waviness of its surfaces which is visible when viewed at an acute angle or in reflected light. Window glass is sometimes referred to in the industry as sheet or shock glass.

§ 21.1 Deception (general).

It is an unfair trade practice for any industry member in connection with the sale, offering for sale, or distribution of industry products to use any advertisement [1] or representation which is false, or which by failure to disclose material facts has the capacity, tendency or effect of misleading purchasers or prospective purchasers with respect to the type, grade, quality, quantity, use, size, design, material, finish, strength, backing, silvering, thickness, composition, origin, preparation, manufacture, value, or distribution of any product of the industry, or in any other material respect. [Guide 1]

§ 21.2 Misrepresentation of kind or type of industry products.

It is an unfair trade practice for any member of the industry to sell, offer for sale, or distribute any industry product under any representation or circumstance having the capacity and tendency or effect of misleading or deceiving purchasers or prospective purchasers in any respect with regard to the kind or type of glass contained in any industry product, or the kind or type of backing affixed thereto.

(a) *Misrepresentation as to kind or type of glass.* (1)(i) It is an unfair trade practice to sell, offer for sale, or distribute any industry product containing "window glass" unless such product is marked, labeled, or stamped so as to reveal that the glass is "window glass."

(ii) The disclosure required by this section must be made on the product and be of such conspicuousness and legibility as to readily come to the attention of the casual observer, and of such permanence, and so affixed, as to remain on the product until consummation of consumer sale thereof. Such disclosure is not required upon industry products 72 square inches or less in size.

(2) In the sale, offering for sale, or distribution of industry products, it is an unfair trade practice to represent that a product contains "crystal" or "crystale" glass, when, contrary to the representation, such product contains a different glass, e.g., "plate glass" or "window glass."

(3) In the sale, offering for sale, or distribution of industry products it is an unfair trade practice to represent window glass as "distortion free," or to represent any other kind of glass as "distortion free," when such is not the fact.

(4) In the sale, offering for sale, or distribution of industry products it is an unfair trade practice to describe the glass contained in an industry product as "shatter proof" unless the glass is so constituted or treated so as in fact to prevent, in the event of breakage, the shattering and dispersal of particles of the glass.

(b) *Misrepresentation as to backing.* (1) In the sale, offering for sale, or distribution of industry products it is an unfair trade practice to represent that an industry product is "copper backed", or is backed with "metallic copper" or has a "copper electroplated" back, or to similarly use any other word, term or legend of like import as descriptive of the backing of an industry product, unless the electroplating of the copper backing is accomplished by an electrolytic process.

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[1] The word "advertisement" as here used includes any written or verbal statement, notice, presentation, illustration, or depiction which directly or indirectly promotes the sale of any industry product, or creates an interest in the purchase of any such product, whether same appears in a newspaper, magazine, catalog, letter, sales promotional literature, radio or television broadcast, or in any other media.

NOTE: For the purposes of this section it is established that both the "galvanic," or "contact" method, of electroplating (i.e., the plating method using a self induced electric current), and the method using an external source of current, are truly electroplating processes. Both processes are equally well defined by the definition of Electroplating established by the American Society for Testing Materials, as follows:

"Electroplating: The electro-deposition of an adherent metallic coating upon an electrode for the purpose of securing a surface with properties or dimensions different from those of the basic metal."

No useful purpose can be served by attempting to establish a differentiation between the mirror backing produced by these two methods.

(2) Nothing in this section shall be construed as prohibiting the use of representations that any backing on products of the industry contains copper, which has been applied mechanically or by means other than the use of electric current when such is the fact, provided that a clear and conspicuous disclosure is made in conjunction with such representations as to the manner of application of the backing, as for example, "window glass mirror, painted back."

(3) The disclosure of the kind or type of glass and the kind and type of backing thereof required under this section may be in the form of a stamp, tag, mark or label on or attached to the product and shall be of such size type and so situated that it will come to the attention of the casual observer and be so affixed as to remain on the product until consumption of consumer sale.

(4) The following are examples of the marks, stamps or labels which will be regarded as meeting the requirements of this section: An industry product containing "plate glass," copper backed by an electrolytic process may be marked or described "plate glass-copper electroplated," or "float glass-copper backed"; an industry product containing window glass backed by an electrolytic process may be marked or described "window glass-copper plated back" or "sheet glass-copper plated back," or an article containing plate glass backed with a copper plating which has been applied mechanically or by means other than the use of electric current may be marked or described as "plate glass-painted back." [Guide 2]

PART 22—GUIDES FOR THE HOSIERY INDUSTRY

Sec.

22.0 Definitions.
22.1 Scope of guides in this part; imports and exports.
22.2 Deception (general).
22.3 "Lisle."
22.4 "Irregulars" or "seconds".
22.5 Removal, obliteration, or alteration of marks.
22.6 Size markings and designations.

AUTHORITY: Secs. 6, 5, 38 Stat. 721, 719; 15 U.S.C. 46, 45.

SOURCE: 44 FR 11184, Feb. 27, 1979, unless otherwise noted.

NOTE: Nothing in this part is to be construed as relieving anyone of the necessity of complying with the requirements of the Wool Products Labeling Act of 1939 or the requirements of the Textile Fiber Products Identification Act or with the rules and regulations issued under such Acts.

§ 22.0 Definitions.

As used in this part the terms "industry member" and "industry products" shall have the following meaning:

Industry member. Any person, firm, corporation, or organization (including manufacturers, wholesalers, jobbers, importers, retailers, etc.) engaged in the sale, offering for sale, or distribution, in commerce, of industry products as defined below.

Industry products. Hosiery for men, women and children, including all types and kinds of hose, stockings, socks, anklets, and other related products of the Hosiery Industry.

§ 22.1 Scope of guides in this part; imports and exports.

(a) *Applicability.* Except where otherwise required by law, the guides in this part shall apply to all hosiery produced in the United States or offered for sale, sold or distributed in the American market.

(b) *Imports.* Imported hosiery is subject to the guides in this part (and the marking requirements herein specified) the same as domestic hosiery, irrespective of whether the hosiery was originally manufactured in the United States and exported and thereafter imported; or whether it was manufactured in a foreign country and imported from such foreign country or another country into the United States; or whether the hosiery, foreign or domestic, was introduced into the American market in any other way.

(c) *Exports.* Hosiery produced in the United States for export to a foreign country need not be marked in accordance with the requirements of the guides in this part, except:

(1) Where such hosiery, although intended for export, or actually exported, is subsequently offered for sale or sold for use, consumption or resale within the United States or place subject to its jurisdiction; or

(2) Where such hosiery manufactured in the United States for export, or sold for export, is marked, sold or exported in such manner or under such conditions as to involve fraud or deception, or an unfair method of competition against an American competitor engaged in export trade, or a matter otherwise contrary to the public policy of the United States; or

(3) Where required by the Wool Products Labeling Act or by other provisions of law. [Guide 1]

§ 22.2 Deception (general).

It is an unfair trade practice to sell, offer for sale, or distribute industry products by any method, or under any representation, description, circumstance or condition which has the capacity and tendency or effect of deceiving purchasers or prospective purchasers as to the grade, character, construction, origin, denier, size, style, fashion, gauge, twist of yarn, quality, quantity, value, price, serviceability, resistance to snagging or the development of runs, holes or breaks in the fabric, strength, stretch, length, color, finish, manufacture, or distribution of any product of the industry or component part of such product, or in any other material respect. [Guide 2]

§ 22.3 "Lisle."

(a) It is an unfair trade practice to use the term "lisle" or word, term, or representation of similar import, as descriptive of hosiery or any part thereof, under any condition having the capacity and tendency or effect of misleading or deceiving purchasers or prospective purchasers. For purposes of this section the term "lisle" as descriptive of hosiery, or part thereof, is considered as representing that such hosiery is made of yarn composed of two or more ply of combed long staple cotton fiber, the ply twist of which is not less than the turns per inch indicated in the following table:

Count	2-ply		3-ply		4-ply	
	Minimum twist	Approximate twist multiplier	Minimum twist	Approximate twist multiplier	Minimum twist	Approximate twist multiplier
30	16	4¼	13	4⅛	11	4
40	19	4¼	15	4⅛	13	4
50	21	4¼	17	4⅛	14	4
60	23	4¼	18	4⅛	15	4
70	25	4¼	20	4⅛	17	4
80	27	4¼	21	4⅛	18	4
90	28	4¼	23	4⅛	19	4
100	29	4¼	24	4⅛	20	4
120	31	4¼	26	4⅛	22	4
140 and higher	33	4¼	28	4⅛	24	4

NOTE: The minimum twist of intermediate counts not given should be in proportion to those given in the table. The average results of tests for number of turns of twist in a yarn shall be reported to the nearest whole number.

Yarns having more than 4 plies shall have not less than the number of turns given for the 4-ply yarn, minus 1 turn for each additional ply above 4; that is, for each additional ply above 4, 1 turn per inch may be deducted from the minimum number of turns given for the 4-ply yarn.

(b) The term "long staple cotton fiber" as used in this section is understood to mean cotton fiber which is not less than 1⅛" in length of staple: *Provided, however,* That nothing in this section shall be construed as prohibiting the use of cotton fiber which is not less than 1$\frac{1}{16}$" in length of staple for the counts of 35 and less above referred to. [Guide 3]

§ 22.4 "Irregulars" or "seconds".

(a) It is an unfair trade practice to fail to disclose on industry products and in all advertising and promotional material relating thereto that such products are "irregulars" or "seconds," when such is the case.

(b) It is an unfair trade practice to cause any industry products to be falsely or deceptively marked, advertised, described or otherwise represented, either as not being or as being "irregulars" or "seconds," when such is not the fact.

(c) For the purpose of this section "irregulars" shall be considered as including all hosiery which is not of first quality but which contains only minor imperfections limited to irregularities in dimensions, size, color or knit, and without the presence of any obvious mends, runs, tears or breaks in the fabric or any substantial damage to the yarn or fabric itself. "Seconds" shall be considered as including all hosiery which is not of first quality, does not qualify as "irregulars" and which contains runs, obvious mends, irregularities, substantial imperfections, or defects in material, construction or finish.

(d) The marking of hosiery under this section shall be made in a conspicuous and non-deceptive manner with sufficient permanency or indelibility to carry through the channels of trade to the ultimate consumer in a clearly legible condition. The words "irregulars" or "seconds" as the case may be shall be set out distinctly by transfer or other marking on the fabric of each stocking, sock or other unit, whether sold in pairs, threes or otherwise. In addition, if the hosiery is packaged in any manner so as to conceal the disclosures required by this section then such disclosures shall also be made on such packaging in a conspicuous and non-deceptive manner. The required disclosures in advertising and other promotional material that industry products are "irregulars" or "seconds," must also be made in a conspicuous and non-deceptive manner. [Guide 4]

§ 22.5 Removal, obliteration, or alteration of marks.

It is an unfair trade practice for any manufacturer, converter, processor, dyer, finisher, distributor, dealer, importer or vendor, or person acting for or in collusion with any concern or vendor,

(a) To remove, obliterate, deface, change, alter, conceal, or make illegible any information required by the guides in this part to be disclosed on industry products, without replacing the same before sale, resale or distribution for sale with a proper mark meeting the requirements of the guides in this part; or (b) to sell, resell, or distribute any industry product without its being marked and described in accordance with the requirements of the guides in this part.

NOTE: Hosiery which has been redyed shall be re-marked in accordance with the requirements of the guides in this part. Hosiery found to contain a false or deceptive mark, or a mark contrary to the requirements of the guides in this part, shall be remarked in accordance with the guides in this part. [Guide 5]

§ 22.6 Size markings and designations.[1]

In connection with the sale or offering for sale of industry products, it is an unfair trade practice:

(a) To mark or otherwise represent any industry product as being of a certain size which is not in fact the true and normal size thereof; or

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[1] Commercial Standard CS 46-49, "Hosiery Lengths and Sizes" is recognized as a proper method to follow in determining measurements and sizes of hosiery.

(b) To alter the true and normal size of industry products by stretching or manipulation so as to deceive purchasers or prospective purchasers as to such size; or

(c) To fail to disclose on industry products the true and normal size thereof when the failure to make such disclosure has the capacity and tendency or effect of deceiving purchasers or prospective purchasers as to the size of such products.

NOTE: So-called "stretch" hose (which is represented as being suitable for more than one size foot) should be marked so as to clearly disclose the minimum and the maximum sizes for which such hose is in fact suitable, and the range should be limited to the sizes which such hose will comfortably fit without undue looseness or tension. [Guide 6]

PART 23—GUIDES FOR THE JEWELRY INDUSTRY

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23.20 Misuse of words "real," "genuine," "natural," etc.
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APPENDIX—LISTING AND CLASSIFICATION OF GUIDES FOR CONVENIENT REFERENCE BY INDUSTRY MEMBERS

AUTHORITY: Sec. 6, 5, 38 Stat. 721, 719; 15 U.S.C. 46, 45.

SOURCE: 44 FR 11185, Feb. 27, 1979, unless otherwise noted.

§ 23.0 Definitions.

As used in the guides in this part, the terms hereinafter set forth shall be understood to have the following meanings:

Diamond. A diamond is a natural mineral consisting essentially of pure carbon crystalized in the isometric system and is found in many colors. Its hardness is 10; its specific gravity approximately 3.52; and it has a refractive index of 2.42.

Pearl. A calcareous concretion consisting essentially of alternating concentric layers of carbonate of lime and organic material formed within the body of certain mollusks, the result of an abnormal secretory process caused by an irritation of the mantle of the mollusk consequent on the intrusion of some foreign body inside the shell of the mollusk, or due to some abnormal physiological condition in the mollusk, neither of which has in any way been caused or induced by man.

Cultured pearl. The composite product created when a nucleus (usually a sphere of calcareous mollusk shell) planted by man inside the shell or in the mantle of a mollusk is coated with nacre by the mollusk.

Imitation pearl. A manufactured product composed of any material or materials which simulates in appearance a pearl or cultured pearl.

§ 23.1 Deception (general).

(a) It is an unfair trade practice for an industry member to sell or offer for sale any industry product under any representation, description, circumstance, or condition having the capacity and tendency or effect of deceiving purchasers or prospective purchasers thereof as to the type, kind, grade, quality, quantity, metallic content, size, weight, cut, color, character, substance, durability, serviceability, origin, price, value, preparation, production, manufacture or distribution of such industry product or which has the capacity and tendency or effect of misleading or deceiving the purchasing or consuming public in any other material respect.

(b) The inhibitions of this section are applicable to all forms of advertising, whether in periodicals, on the radio or television, and whether written or oral, and to any form of marking or labeling of products or their containers. [Guide 1]

§ 23.2 Misleading illustrations.

It is an unfair trade practice, in connection with the offering for sale, sale, or distribution of industry products, to use, as part of any packaging material, label, advertisement, or other sales promotion matter, any visual representation, picture, illustration, diagram or other depiction which, either alone or in conjunction with any accompanying words or phrases, has the capacity and tendency or effect of misleading or deceiving purchasers or prospective purchasers concerning the type, kind, grade, quality, quantity, metallic content, size, weight, cut, color, character substance, durability, serviceability, origin, preparation, production, manufacture, or distribution of any industry product, or which has the capacity and tendency or effect of misleading or deceiving the purchasing or consuming public in any material respect.

Note: Among practices inhibited by this section are illustrations and depictions of diamonds in greater than actual size without a clear and conspicuous disclosure of the fact that the illustrations or depictions are enlargements, when the failure to make such disclosure has the capacity and tendency or effect of deceiving purchasers or prospective purchasers of such diamonds or any products containing same. [Guide 2]

§ 23.3 Misrepresentation as to origin and disclosure of foreign origin.

(a) It is an unfair trade practice to misrepresent the place of origin, production, or manufacture of industry products or their components.

(b) It is an unfair trade practice to offer for sale, sell, or distribute any industry product manufactured or produced in a foreign country, or any industry product containing a part or parts manufactured or produced in a foreign country, without affirmatively and clearly disclosing thereon, or in immediate conjunction therewith, by a truthful and nondeceptive mark, stamp, brand, or label, the country of origin of such product or part, where failure to so disclose the country of origin has the capacity and tendency or effect of misleading or deceiving the purchasing or consuming public in any material respect.

Note: Nothing in paragraph (b) of this section shall be construed as requiring disclosure as to the foreign origin of such small and primarily functional parts as rivets, screws, bolts, washers, springs, spring bars and spring rings; or as to the foreign origin of pearls, cultured pearls, diamonds, or any other precious or semi-precious stones, or glass insets which imitate precious or semi-precious stones, when same are primarily obtained from sources outside the United States and its territories and possessions; or as to the foreign origin of any other part or parts which, by reason of further processing in this country, no longer retain the appearance and essential characteristics possessed by them at the time of their importation. Disclosure of the foreign origin of imitation pearls which have not been subjected to processing in this country to the extent of losing the appearance and essential characteristics possessed by them at the time of their importation must be made though such imitation pearls after importation have been strung and made into necklaces in this country. [Guide 3]

§ 23.4 Misuse of terms "hand-made," "hand-polished," etc.

(a) It is an unfair trade practice to represent, directly or by implication, that any industry product is hand-made or hand-wrought unless the entire shaping and forming of such product from raw materials and its finishing and decoration were accomplished by hand labor and manually-controlled methods which permit the maker to control and vary the construction, shape, design, and finish of each part of each individual product.

Note: As used here, "raw materials" include bulk sheet, strip, wire, and similar items that have not been cut, shaped, or formed into jewelry parts, semi-finished parts, or blanks.

(b) It is an unfair trade practice to represent, directly or by implication, that any industry product is hand-forged, hand-engraved, hand-finished, or hand-polished, or has been otherwise hand-processed, unless the operation described was accomplished by hand labor and manually controlled methods which permit the maker to control and vary the type, amount, and effect of such operation on each part of each individual product. [Guide 4]

§ 23.5 Misrepresentation as to gold content.

(a) It is an unfair trade practice to sell or offer for sale any industry product under any trade or product name or designation or other representation having the capacity and tendency or effect of deceiving purchasers or prospective purchasers thereof as to the presence of gold or gold alloy in the product, or as to the quantity or fineness of gold alloy contained in the product, or as to the fineness, thickness, weight ratio, or manner of application of any gold or gold alloy plating, covering, or coating on any surface of any industry product or part thereof.

(b) The following practices are among those to be regarded as inhibited by paragraph (a) of this section:

(1) Use of the unqualified word "Gold," or any abbreviation thereof, as descriptive of any industry product, or part thereof, which is not composed throughout of fine (24 karat) gold.

(2) Use of the word "Gold," or any abbreviation thereof, as descriptive of any industry product, or part thereof, which is composed throughout of an alloy of gold, unless a correct designation of the karat fineness of the alloy immediately precedes the word "Gold," or abbreviation thereof, and such fineness designation is of at least equal conspicuousness therewith.

(3) Use of the word "Gold," or any abbreviation thereof, as descriptive of any industry product, or part thereof, which is not composed throughout of gold or gold alloy, but is surface-plated or coated with gold alloy, unless the word "Gold," or abbreviation thereof, is so qualified as adequately and nondeceptively to disclose that the product or part is but surface-plated or coated with an alloy of gold; and, when such plating has been mechanically applied, unless such word "Gold," or abbreviation thereof, is immediately preceded by a correct designation of the karat fineness of the alloy and such fineness designation is of at least equal conspicuousness therewith.

NOTE: See acceptable forms of markings and descriptions for such products set out in paragraph (c)(2) of this section.

(4) Use of the terms "Gold Filled," "Rolled Gold Plate," "Rolled Gold Plated," "Gold Overlay," "Gold Plated," or "Gold Plate," as descriptive of any industry product or part thereof, unless such product or part contains a surface-plating of gold alloy applied by a mechanical process which is of such thickness and extent of surface coverage that use of the term as descriptive of the product or part will not have the capacity and tendency of deceiving purchasers or prospective purchasers, and unless the term is immediately preceded by a correct designation of the karat fineness of the alloy and such designation is of at least equal conspicuousness as the term used.

NOTE: See acceptable forms of markings and descriptions for such products set out in paragraph (c)(2) of this section.

(5) Use of the term "Gold Electroplate," or "Gold Electroplated," as descriptive of any industry product or part thereof, unless such product or part is plated or coated with gold or a gold alloy and such plating or coating is of such karat fineness, thickness, and extent of surface coverage that the use of the term will not have the capacity and tendency of deceiving purchasers or prospective purchasers.

NOTE: See acceptable forms of markings and descriptions for such products set out in paragraph (c)(3) of this section.

(6) Representing, directly or by implication, by use of any name, terminology, or otherwise, that an industry product is equal or superior to, or different than, a known and established type of industry product with reference to its gold content or method of manufacture, unless the representa-

tion is true in fact (namely, that it is equal or superior to or different than the established type in the respects represented or implied).

Note 1: Requirements for use of the word "Gold," or any abbreviation thereof, as above set forth, are applicable to "Duragold," "Diragold," "Noblegold," "Goldine," or any words or terms of similar import.

Note 2: See also § 23.8 entitled "Additional requirements relating to quality marks."

(7) Use of the word "Gold," or any abbreviation thereof, as descriptive of any industry product, or part thereof, which is composed throughout of an alloy of gold of less than 10 karat fineness.

(c) Markings and descriptions of industry products or parts thereof will be considered as meeting the requirements of this section when in conformity with the following:

(1) An industry product or part thereof composed throughout of an alloy of gold of not less than 10 karat fineness may be marked and described as "Gold" when such word "Gold," whether appearing, is immediately preceded by a correct designation of the karat fineness of the alloy and such karat designation is of equal conspicuousness as the word "Gold," (as, for example, "14 Karat Gold," and "14 K. Gold," and "14 Kt. Gold"). Such product may also be marked and described by a designation of the karat fineness of the gold alloy unaccompanied by the word "Gold" (as, for example, "14 Karat," "14 Kt.," and "14 K.").

Note: When the term "Gold," or any abbreviation thereof, is used as descriptive of any product or part of a product which is composed throughout of gold alloy but contains a concealed hollow center or interior, the term or its abbreviation shall also be immediately accompanied by a disclosure of the fact that the product or part contains a hollow center or interior (as, for example, "14 Karat Gold-Hollow Center" and "14 K. Gold Tubing," when of a gold alloy tubing of such a karat fineness), when the failure to make such disclosure has the capacity and tendency or effect of deceiving purchasers or prospective purchasers. Such products must not be marked or described as "solid" or as being solidly of gold or of a gold alloy. For example, though the composition of such a product is 14 karat gold alloy, it shall not be described or marked as either "14 Kt. Solid Gold" or as "Solid 14 Kt. Gold."

(2) An industry product or part thereof on which there has been affixed on all significant surfaces, by soldering, brazing, welding, or other mechanical means, a plating of gold alloy of not less than 10 karat fineness which is of substantial thickness,[1] may be marked or described as "Gold Filled," "Gold Plate," "Gold Plated," "Gold Overlay," "Rolled Gold Plate," or adequate abbreviations thereof, when such plating constitutes at least 1/20th of the weight of the metal in the entire article, and when the term is immediately preceded by a designation of the karat fineness of the plating which is of equal conspicuousness as the term used (as, for example, "14 Kt. Gold Filled," "14 Kt. G. F.," "14 Kt. Gold Plated," "14 Kt. G. P., " and "14 Kt. Gold Overlay"). When conforming to all such requirements except the specified minimum of 1/20th of the weight of the metal in the entire article, the terms "Gold Plate," "Gold Plated," "Rolled Gold Plate," and "Gold Overlay" may be used when the karat fineness designation is immediately preceded by a fraction which accurately discloses the portion of the weight of the metal in the entire article accounted for by the plating, and when such fraction is of equal conspicuousness as the term used (as, for example, "1/40 12 Kt. Rolled Gold Plate," and "1/40 12 Kt. R. G. P.").

(3) An industry product or part thereof, all significant surfaces on which there has been affixed by an electrolytic process a coating or plating of gold, or of a gold alloy of not less than 10 karat fineness, the mini-

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[1] As here used, the term "substantial thickness" is to be construed as requiring that all areas of the plating be of such thickness as to assure of a durable coverage of the base metal to which it has been affixed. Since industry products embrace items having surfaces and parts of surfaces which are subject to different degrees of wear, this requirement of substantial thickness may not necessitate uniformity of thickness of plating for all items or for different areas of the surface or surfaces of individual items.

mum thickness throughout of which is equivalent to 7/1,000,000ths of an inch of fine gold, may be marked or described as "Gold Electroplate" or "Gold Electroplated." When the coating or plating meets the minimum fineness, but not the minimum thickness, above specified, the marking or description may be "Gold Flashed" or "Gold Washed," and when of the minimum fineness above specified and of a minimum thickness throughout which is equivalent to 100/1,000,000ths of an inch of fine gold, the marking or description may be "Heavy Gold Electroplate" or "Heavy Gold Electroplated." When coatings or platings qualify for the term "Gold Electroplate" (or "Gold Electroplated"), or the term "Heavy Gold Electroplate" (or "Heavy Gold Electroplated"), and have been applied by use of a special kind of an electrolytic process, the designation for which the coating or plating is qualified may be accompanied by an identification of the process used, as for example, "Gold Electroplated (X Process)"; "Heavy Gold Electroplated (Y Process)."

(d) The requirements of this section relating to markings and descriptions of industry products and parts thereof are subject to the tolerances applicable thereto under the National Stamping Act (15 U.S.C.294, et seq.) and to the exemptions applicable thereto under section 10 of Commercial Standard CS 67-38, relating to marking articles made of karat gold, and under section 12(a) of Commercial Standard CS 47-34 (including supplement thereof effective February 25, 1939), relating to marking of gold filled and rolled gold plate articles other than watch cases.

(e) The exemption provisions of Commercial Standard CS 67-38, mentioned in paragraph (d) of this section, are as follows:

10. Exemptions recognized in the jewelry trade and not to be considered in any assay for quality include springs, posts, and separable backs of lapel buttons, posts and nuts for attaching interchangeable ornaments, and wire pegs or rivets used for applying mountings and other ornaments, which mountings or ornaments shall be of the quality marked.

(f) The exemption provisions of Commercial Standard CS 47-34, mentioned in paragraph (d) of this section, are as follows:

12(a). Exemptions recognized in the jewelry trade and not to be considered in any assay for quality include joints, catches, screws, pin stems, pins of scarf pins, hat pins, etc., field pieces and bezels for lockets, posts and separate backs of lapel buttons, springs, and metallic parts completely and permanently encased in a nonmetallic covering. Field pieces of lockets are those inner portions used as frames between the inside edges of the locket and the spaces for holding pictures. Bezels are the separable inner metal rings used to hold the pictures in place. [Guide 5]

[44 FR 11185, Feb. 27, 1979, 44 FR 16004, Mar. 16, 1979]

§ 23.6 Misrepresentation as to silver content.

(a) It is an unfair trade practice to misrepresent in any way the silver content or fineness of silver content of any industry product, or to represent such product as having a silver content, plating, electroplating, or coating, when such is not the fact.[2]

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[2] The requirements of this section relating to markings and descriptions of industry products and parts thereof are subject to the tolerances applicable thereto under the National Stamping Act (15 U.S.C. 294, et seq.) and to the exemptions applicable thereto under section 8 of Commercial Standard CS 118-44 (Marking of Jewelry and Novelties of Silver), and section 8(a) of Commercial Standard CS 51-35 (Marking Articles Made of Silver in Combination with Gold).

The exemption provisions of Commercial Standard CS 118-44, above mentioned, are as follows:

8. Exemptions: The only exemptions recognized and not to be included in any assay for quality include screws, rivets, springs, spring pins for wrist watch straps; posts and separable backs of lapel buttons; wire pegs, posts and nuts used for applying mountings or other ornaments, which mountings or ornaments shall be of the quality marked; pin stems of badges, brooches, emblem pins, hat pins, and scarf pins; levers for belt buckles; and blades and skeletons of pocket knives.

The exemption provisions of Commercial Standard CS 51-35, above mentioned, are as follows:

Continued

(b) It is an unfair trade practice to mark, describe, or otherwise represent, any industry product, or part thereof, as "silver," "solid silver," "Sterling," or "Sterling Silver," unless it is at least 925/1,000ths pure silver.

(c) It is an unfair trade practice to mark, describe, or otherwise represent, any industry product, or part thereof, as "coin" or "coin silver," unless it is at least 900/1,000ths pure silver.

(d) It is an unfair trade practice to apply the term "Sterling" or "coin," either alone or in conjunction with any other word or words, in any manner to a silver-plated article or to the plating thereon.

(e) It is an unfair trade practice to mark, describe, or otherwise represent, any industry product, or part thereof, as being plated or coated with silver, unless all significant surfaces of the product or part contain a plating or coating of silver which is of substantial thickness.

NOTE: See also § 23.8 entitled "Additional requirements relating to quality marks." [Guide 6]

§ 23.7 Misuse of words "platinum," "iridium," "palladium," "ruthenium," "rhodium," and "osmium."

It is an unfair trade practice to use the words "platinum," "iridium," "palladium," "ruthenium," "rhodium," or "osmium," or any abbreviations thereof, as a marking on, or as descriptive of, any industry product or part thereof, under any circumstance or condition having the capacity and tendency or effect of deceiving purchasers or prospective purchasers as to the true composition of such product or part.

NOTE 1: Commercial Standard CS66-38, issued by the National Bureau of Standards of the U.S. Department of Commerce, covers the marking of articles made wholly or in part of platinum. Markings on industry products which are in compliance with the requirements of CS66-38 will be regarded as among those fulfilling the requirements relating thereto which are contained in this section.

NOTE 2: See also § 23.8 entitled "Additional requirements relating to quality marks." [Guide 7]

§ 23.8 Additional requirements relating to quality marks.

As used in this section, the term "quality mark" means any letter, figure, numeral, symbol, sign, word, or term, or any combination thereof, which has been stamped, embossed, inscribed, or otherwise placed, on any industry product and which indicates or suggests that any such product is composed throughout of any precious metal or any alloy thereof or has a surface or surfaces on which there has been plated or deposited any precious metal or alloy thereof. Included are the words "gold," "karat," "carat," "silver," "sterling," "platinum," "iridium," "palladium," "ruthenium," "rhodium," or "osmium," or any abbreviation thereof, whether used alone or in conjunction with the word "filled," "plated," "overlay," "electroplated," or any abbreviation thereof. Requirements of this section are additional to those provided for in §§ 23.5, 23.6, and 23.7.

(a) *Deception as to applicability of marks.* (1) It is an unfair trade practice to sell, offer for sale, or distribute any industry product on which a quality mark appears when by reason of the location of such mark, the failure to conjunctively identify the part or portion of the product to which same is applicable (or part or portion to which same is inapplicable), or otherwise, such mark has the capacity and tendency or effect of deceiving purchasers or prospective purchasers as to the metallic composition of the product or any part thereof.

(2) When a quality mark has proper application but to one or more parts of an industry product and not to another part or parts thereof which are of similar surface appearance, each quality mark should be closely accompanied by an identification of the part or parts to which the mark is applicable.

(b) *Deception by reason of difference in the size of letters or words in a*

8(a). Unless otherwise required by the National Stamping Act, exemptions recognized in the jewelry trade and not to be considered in any assay for quality include joints, catches, screws, pin stems, pins of scarf pins, hat pins, etc., posts and separable backs of lapel buttons, springs, and metallic parts completely and permanently encased in a nonmetallic covering.

marking or markings. It is an unfair trade practice to sell, offer for sale, or distribute any industry product on which there appears a quality mark in which words or letters appear in greater size than other words or letters of the marking, or when different markings placed on the product have different applications and are in different sizes, when any such marking has the capacity, tendency, or effect of deceiving purchasers or prospective purchasers of the product as to the metallic composition of such product or any part thereof. (An example of improper marking subject to the inhibitions of this paragraph would be the marking of a gold electroplated product with the word "electroplate" in small type and the word "gold" in larger type, with the result that purchasers and prospective purchasers of the product would observe the word "gold" of the marking and unlikely observe the word "electroplate".)

NOTE 1: *Legibility of markings.* Quality markings on industry products should be of sufficient size type as to be legible to persons of normal vision, and be so placed as likely to be observed by purchasers or prospective purchasers thereof. When such size marking cannot be achieved without injury to the appearance of the article, a tag or label on which the marking appears in type which is readable by persons of normal vision should be attached to the product and remain thereon until consumer purchase.

NOTE 2: *Disclosure of identity of manufacturers, processors, or distributors.* It is the consensus of the members of this industry that all quality markings on industry products should be accompanied by the name, or other adequate identification, of the manufacturer, processor, or distributor responsible for such marking. Quality markings include those in which the words or terms "gold," "karat," "silver," "platinum" (or platinum related metals), or their abbreviations, are included, either separately or as suffixes, prefixes, or syllables. [Guide 8]

§ 23.9 Misuse of the word "diamond."

(a) In the sale, offering for sale, or distribution of industry products, it is an unfair trade practice for any industry member to use the unqualified word "diamond" as descriptive of, or as an identification for, any object or product not meeting the requirements specified in the definitions of diamond hereinabove set forth, or which, though meeting such requirements, has not been symmetrically fashioned with at least seventeen (17) polished facets.

(b) The foregoing provisions of this section have application to the unqualified use of the word "diamond." They are not to be construed as inhibiting:

(1) The use of the words "rough diamond" as descriptive of, or as a designation for, uncut or unfaceted objects or products meeting the requirements specified in the mentioned definition of diamond; or

(2) The use of the word "diamond" as descriptive of, or as a designation for, objects or products meeting the requirements of said definition of diamond but which have not been symmetrically fashioned with at least seventeen (17) polished facets when in immediate conjunction with the word "diamond" there is either a disclosure of the number of facets and shape of the diamond or the name of a type of diamond which denotes shape and which usually has less than seventeen (17) facets (e.g., "rose diamond").

NOTE: Additional requirements relating to imitation and synthetic diamond representations and misuse of words "reproduction," "replica," "gem," "real," "genuine," "natural," etc., are set forth in §§ 23.19, 23.20 and 23.21. [Guide 9]

§ 23.10 Misuse of word "perfect," etc.

(a) It is an unfair trade practice to use the word "perfect," or any other word, expression, or representation of similar import, as descriptive of any diamond which discloses flaws, cracks, carbon spots, clouds, or other blemishes or imperfections of any sort when examined in normal daylight, or its equivalent, by a trained eye under a ten-power, corrected diamond eye loupe or other equal magnifier.

NOTE: The use, with respect to a stone which is not perfect, of any phrase (such as "commercially perfect") containing the word "perfect" or "perfectly" is regarded as misleading and in violation of this section.

Paragraph (a) of this section shall not be construed as approving the use of the word "perfect," or any word or representation of like import, as descriptive of any diamond that is of inferior color or make.

Nothing in this section is to be construed as inhibiting the use of the word "flawless" as descriptive of a diamond which meets the requirements for "perfect" set forth in paragraph (a) of this section.

(b) It is an unfair trade practive, in connection with the offering of any ring or rings or other articles of jewelry having a perfect center stone or stones, and side or supplementary stones which are not of such quality, to use the word "perfect" without clearly disclosing that such description applies only to the center stone or center stones. [Guide 10]

§ 23.11 Misuse of term "blue white."

It is an unfair trade practice to use the term "blue white," or any other term, expression, or representation of similar import, as descriptive of any diamond which under normal, north daylight or its equivalent, shows any color or any trace of any color other than blue or bluish.

Note: For additional requirements respecting artificially colored diamonds, see the note immediately following § 23.18 [Guide 11]

§ 23.12 Misuse of the term "properly cut," etc.

It is an unfair trade practice to use the terms, "properly cut," "proper cut," "modern cut," "well made," or expressions of similiar import, to describe any diamond that is lopsided, or so thick or so thin in depth as materially to detract from the brilliance of the stone.

Note. This section prohibits the commonly called "fisheye" or "old mine" stone from being offered as "properly cut," "modern cut," etc. [Guide 12]

§ 23.13 Misuse of the words "brilliant" and "full cut."

It is an unfair trade practice to use the unqualified expressions "brilliant," "brilliant cut," or "full cut" to describe, identify, or refer to any diamond except a round diamond which has at least thirty-two facets plus the table above the girdle and at least twenty-four facets below.

Note: Such terms should not be applied to single or rose-cut diamonds, either with or without qualification. They may be applied to emerald- (rectangular) cut, pear-shaped, heart-shaped, oval-shaped, and marquise- (pointed oval) cut diamonds meeting the above-stated facet requirements when, in immediate conjunction with the term used, disclosure is made of the fact that the diamond is of such form. [Guide 13]

§ 23.14 Misuse of term "clean," etc.

It is an unfair trade practice to use the term "clean," "eye clean," "commercially clean," "commercially white," or any other term, expression, or representation of similar import, in advertising, labeling, representing, or describing any diamond, when such terms are used for the purpose, or with the capacity and tendency or effect, of misleading or deceiving purchasers, prospective purchasers, or the consuming public. [Guide 14]

§ 23.15 Misuse of the word "pearl."

(a) It is an unfair trade practice to use the unqualified word "pearl," or any other word or phrase of like meaning or connotation, to describe, identify, or refer to any object or product which is not in fact a pearl as defined hereinabove.

(b) It is an unfair trade practice to use the word "pearl" to describe, identify, or refer to a cultured pearl unless it is immediately preceded, with equal conspicuity, by the word "cultured" or "cultivated," or by some other word or phrase of like meaning and connotation, so as to indicate definitely and clearly that the product is not a pearl.

(c) It is an unfair trade practice to use the word "pearl" to describe, identify, or refer to an imitation pearl unless it is immediately preceded, with equal conspicuity, by the word "imitation" or "simulated," or by some other word or phrase of like meaning and connotation, so as to indicate definitely and clearly that the product is not a pearl.

Note: The placing of an asterisk next to the word "pearl," which asterisk makes reference to a footnote explanation of the fact that the product is an imitation or cultured pearl, is not regarded as compliance with the requirements of this section. [Guide 15]

§ 23.16 Misuse of terms "cultured pearl," "cultivated pearl," "seed pearl," "Oriental pearl," "Oriental," "natura," and "kultured."

(a) It is an unfair trade practice to use the term "cultured pearl," "cultivated pearl," or any other word, term, or phrase of like meaning or connotation, to describe, identify, or refer to any imitation pearl.

(b) It is an unfair trade practice to use the term "seed pearl," or any word, term, or phrase of like meaning or connotation, to describe, identify, or refer to any cultured pearl or imitation pearl.

(c) It is an unfair trade practice to use the term "Oriental pearl," or any word, term, or phrase of like meaning or connotation, to describe, identify, or refer to any product of the industry other than a pearl taken from a salt water mollusk and of the distinctive appearance and type of pearls obtained from mollusks inhabitating the Persian Gulf and recognized in the jewelry trade as Oriental pearls.

(d) It is an unfair trade practice to use the word "Oriental" to describe, identify, or refer to any cultured or imitation pearl.

(e) It is an unfair trade practice to use the word "natura," or any word, term, or phrase of like meaning or connotation, to describe, identify, or refer to a cultured or imitation pearl.

(f) It is an unfair trade practice to use the word "kultured," or any word, term, or phrase of like meaning or connotation, to describe, identify, or refer to an imitation pearl. [Guide 16]

§ 23.17 Misrepresentation as to cultured pearls.

It is an unfair trade practice, in connection with the distribution, sale, or offering for sale of industry products, to make, publish, or disseminate, or cause to be made, published, or disseminated, any false, misleading, or deceptive statement, representation, or illustration concerning the matter in which cultured pearls are produced, the size of the nucleus artificially inserted in the oyster and included in cultured pearls, the length of time that such products remained in the oyster, the thickness of the nacre coating, the value and quality of cultured pearls as compared with the value and quality of pearls and imitation pearls or concerning any other material matter relating to the formation, structure, properties, characteristics, and qualities of cultured pearls.

NOTE: Additional requirements relating to misuse of the words "real," "genuine," "natural," "reproduction," "replica," "synthetic," "gems," etc., are set forth in §§ 23.20 and 23.21 [Guide 17]

§ 23.18 Deception as to precious and semi-precious stones.

It is an unfair trade practice, in connection with the offering for sale, sale, or distribution of precious or semi-precious gem stones, to use or cause or promote the use of any trade promotional literature, advertising matter, mark, brand, label, trade name, picture, design or device, or other type of oral or written representation, however, disseminated or published, which has the capacity and tendency or effect of misleading or deceiving the purchasing or consuming public in any other material respect.

NOTE: One of the practices to be considered as inhibited by this section is as follows: The sale, or offering for sale, of any diamond or other natural precious or semi-precious stone which has been artificially colored or tinted by coating, irradiating, or heating, or by use of nuclear bombardment, or by any other means, without disclosure of the fact that such natural stone is colored, and disclose that such artificial coloring or tinting is not permanent if such is the fact. [Guide 18]

§ 23.19 Misuse of words "ruby," "sapphire," "emerald," "topaz," "stone," "birthstone," etc.

(a) It is an unfair trade practice to use the unqualified words "ruby," "sapphire," "emerald," "topaz," or the name of any other precious or semi-precious stone, as descriptive of any product which is not in fact a natural stone of the type described.

(b) It is an unfair trade practice to use the words "ruby," "sapphire," "emerald," "stone," "birthstone," or the name of any other precious or semi-precious stone, as descriptive of a synthetic stone or an imitation or simulated stone unless such word or name is immediately preceded, with equal conspicuity, by the word "synthetic," or by the word "imitation" or "simulated," whichever is applicable, or by some other word or phrase of like meaning, so as clearly to disclose the nature of such product and the fact that it is not a natural stone.

NOTE: The placing of an asterisk next to the word "stone" or "birthstone," or the name of any natural stone referring to a footnote explanation that the product is a synthetic or imitation is not to be regarded as compliance with the requirements of this section. [Guide 19]

§ 23.20 Misuse of words "real," "genuine," "natural," etc.

It is an unfair trade practice to use the words "real," "genuine," "natural," or similar terms, as descriptive of any article or articles which are manufactured or produced synthetically or artificially, or artificially cultured or cultivated, with the capacity and tendency or effect of misleading or deceiving purchasers, prospective purchasers, or the consuming public. [Guide 20]

§ 23.21 Misuse of words "gem," "reproduction," "replica," "synthetic," etc.

(a) It is an unfair trade practice to use the word "gem" or similar terms to describe, identify, or refer to a pearl, cultured pearl, diamond, ruby, sapphire, emerald, topaz, or other product of the industry, which does not possess the beauty, symmetry, rarity, and value necessary for qualification as a gem.

(b) It is an unfair trade practice to use the word "gem" as descriptive of any synthetic industry product unless the product meets the requirements of paragraph (a) of this section and unless such word is immediately accompanied, with equal conspicuity, by the word "synthetic," or by some other word or phrase of like meaning, so as clearly to disclose the fact that it is not a natural gem.

NOTE: Use of the word "gem" with respect to cultured pearls and synthetic stones should be avoided since few cultured pearls or synthetic stones possess the necessary qualifications to properly be termed "gems." Imitation pearls, imitation diamonds, and other imitation stones cannot be described as "gems" under any circumstances. Not all diamonds or natural stones, including those classified as precious stones, possess the necessary qualifications to properly be termed "gems."

(c) It is an unfair trade practice to use the words "reproduction," "replica," or similar terms, to describe, identify, or refer to a cultured or imitation pearl, or to any imitation of precious or semi-precious stones.

(d) It is an unfair trade practice to use the word "synthetic" as descriptive of cultured or imitation pearls, or to use the word "synthetic" with the name of any natural stone as descriptive of any industry product, unless such industry product has essentially the same optical, physical, and chemical properties as the stone named. [Guide 21]

APPENDIX—LISTING AND CLASSIFICATION OF GUIDES FOR CONVENIENT REFERENCE BY INDUSTRY MEMBERS

Category I. Guides in this part having application to all industry products regardless of their composition:

Sec.
23.1 Deception (general).
23.2 Misleading illustrations.
23.3 Misrepresentation as to origin and disclosure of foreign origin.
23.4 Misuse of terms "hand-made," "hand-polished," etc.

Category II. Guides in this part having application to industry products composed in whole or in part of a precious metal or metals:

23.5 Misrepresentation as to gold content.
23.6 Misrepresentation as to silver content.
23.7 Misuse of words "platinum," "iridium," "palladium," "ruthenium," "rhodium," and "osmium."
23.8 Additional requirements relating to quality marks.

Category III. Guides in this part having application to industry products containing diamonds or imitations thereof:

23.9 Misuse of the word "diamond."
23.10 Misuse of word "perfect," etc.
23.11 Misuse of term "blue white."
23.12 Misuse of the term "properly cut," etc.
23.13 Misuse of the words "brilliant" and "full cut."
23.14 Misuse of the term "clean," etc.

NOTE: These guides also have application to diamonds which are sold in the loose and unset state.

Category IV. Guides in this part having application to industry products containing pearls, cultured pearls, or imitations thereof:

23.15 Misuse of the word "pearl."
23.16 Misuse of terms "cultured pearl," "cultivated pearl," "seed pearl," "Oriental pearl," "Oriental," "natura," and "kultured."
23.17 Misrepresentation as to cultured pearls.

NOTE: These guides also have application to pearls, cultured pearls, and imitation pearls sold in the loose (unstrung and unset) state.

Category V. Guides in this part having application to industry products containing rubies, sapphires, and emeralds and other precious or semi-precious stones, and synthetic and imitation stones:

23.18 Deception as to precious and semi-precious stones.
23.19 Misuse of words "ruby," "sapphire," "emerald," "topaz," "stone," "birthstone," etc.
23.20 Misuse of words "real," "genuine," "natural," etc.
23.21 Misuse of words "gem," "reproduction," "replica," "synthetic," etc.

NOTE: Industry products covered by the guides in Categories II through V are also subject to the guides in Category I.

PART 24—GUIDES FOR THE LUGGAGE AND RELATED PRODUCTS INDUSTRY

Sec.
24.0 Definitions.
24.1 Deception (general).
24.2 Deception as to composition.
24.3 Deceptive practices as to aniline finish, graining, embossing and processing.
24.4 Deception as to hardware, frame or box.
24.5 Misuse of the terms "waterproof," "dustproof," "warpproof," "scuffproof" and "scratchproof."

AUTHORITY: Secs. 6, 5, 38 Stat. 721, 719, 15 U.S.C. 46, 45.

SOURCE: 44 FR 11190, Feb. 27, 1979, unless otherwise noted.

§ 24.0 Definitions.

Industry member. Any person, firm, corporation or organization engaged in the manufacture, sale or distribution of any industry products as defined below.

Industry products. Industry products consist of all kinds and type of trunks, suitcases, traveling bags, sample cases, instrument cases, brief cases, ring binders, billfolds, wallets, key cases, coin purses, card cases, french purses, dressing cases, stud boxes, tie cases, jewel boxes, travel kits, gadget bags, camera bags, and similar articles, of any composition. Ladies' handbags are not included.

§ 24.1 Deception (general).

It is an unfair trade practice to sell, offer for sale, or distribute industry products by any method, or under any circumstance or condition which has the capacity and tendency or effect of misleading or deceiving the purchasing or consuming public with respect to the kind, grade, quality, quantity, material content, thickness, finish, serviceability, durability, price, origin, size, weight, ease of cleaning, construction, manufacture, processing, or distribution of any product of the industry or part thereof, or in any other material respect. [Guide 1]

§ 24.2 Deception as to composition.

(a) In the sale, offering for sale, or distribution of industry products, it is an unfair trade practice to misrepresent the composition of any industry product or part thereof, or to fail to disclose, in the manner hereinafter set forth (see paragraph (b)(9) of this section), material facts concerning the composition of an industry product when the failure to do so has the capacity and tendency or effect of deceiving purchasers or prospective purchasers.

(b) The foregoing provisions of this section are to be construed as, but not limited to:

(1) *Split leather.* Requiring disclosure[1] of the fact that an industry product, or part thereof, is made of split leather if the split leather is visible or if any representation is made as to the composition thereof. For example, a disclosure such as,

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[1] See paragraph (b)(9) of this section.

Split Cowhide

NOTE: For purposes of this part leather from portions of hides or skins which have been split into two or more thicknesses, other than the grain or hair side, shall be considered split leather.

(2) *Imitation or simulated leather.* Requiring that when an industry product or part thereof is made of non-leather material which has the appearance of leather, disclosure[1] be made either of the fact that the material is not leather, or of the general nature of the material as will clearly show that it is not leather, as, for example:

Not leather
Imitation leather
Simulated leather
Vinyl
Vinyl coated fabric
Plastic

(3) *Embossed or processed leather.* Requiring disclosure[1] of the kind and type of leather which an industry product or part thereof is made when such leather has been embossed, dyed, or otherwise processed, so as to simulate the appearance of a different kind or type of leather, as, for example:

(i) An industry product made wholly of top grain cowhide which has been processed so as to imitate pigskin may be represented as being made of:

Top Grain Cowhide

(ii) Any additional representation as may be made concerning the simulated appearance of an industry product composed of leather shall be immediately accompanied by the required disclosure of the kind and type of leather in the product, as, for example:

Top Grain Cowhide
Simulated Pigskin Grain

(4) *Backing material.* Requiring disclosure[1] that any material in an industry product is backed with another kind of material when the backing is not apparent to purchasers or prospective purchasers upon casual inspection of the product, or when representations are made which, in the absence of such disclosure, would be deceptive as to the composition of the product. For example, disclosures such as,

Top Grain Cowhide Backed With Split Cowhide; or
Split Cowhide Backed With Simulated Leather; or
Vinyl Backed With Other Material.

If the different backing material used is visible and is split leather, non-leather material which has the appearance of leather, or leather processed so as to simulate a different kind of leather, disclosure as is required by paragraph (1), (2) or (3) of this paragraph (b), whichever is applicable, must also be made.

(5) *Fictitious animal designations.* Prohibiting any representation or implication that an industry product is made in whole or in part from the skin or hide of an animal which in fact is nonexistent.

(6) *Misuse of trade names, etc.* Prohibiting the use of any trade name, coined name, trade-mark, or other word or term, or any depiction or device, which has the capacity and tendency or effect of deceiving purchasers or prospective purchasers into believing that an industry product is made in whole or in part from the skin or hide of an animal or that material in an industry product is leather, top grain leather, split leather, plastic, fiber-glass, nylon or other material, when such is not the case. This prohibition shall include, among other practices, the use of a stamping, tag, label, card, or other device in the shape of a tanned hide or skin or in the shape of a silhouette of an animal in connection with any industry product having the appearance of leather but which is not made wholly or in substantial part from the skin or hide of an animal.

(7) *Misrepresentation that product is wholly of a particular composition.* Prohibiting any representation or implication that an industry product is made wholly of a particular composition when such is not the case. A representation as to the composition of a particular part of a product must clearly indicate the part to which the representation is properly applicable.

(i) Where a product is made principally of top grain leather or of split leather with the exception of certain non-leather parts thereof which have the appearance of leather, the product may be described as made of top grain leather or split leather, as the case may be, except for such designated non-leather parts when accompanied by disclosure [1] either of the fact that the designated parts are not leather or of the general nature of such parts as will clearly show that they are not leather. For example: A brief case made of top grain cowhide except for frame covering, gussets and partitions which are made of plastic but have the appearance of leather may be described as:

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[1] See paragraph (b)(9) of this section.

Top Grain Cowhide With Plastic Frame Covering, Gussets and Partitions; or
Top Grain Cowhide With Gussets, Frame Covering and Partitions Made of Non-leather Material.

A zipper binder made throughout, except for hardware, of vinyl backed with split cowhide may be described as:

Vinyl Backed With Split Cowhide

(See also disclosure requirements concerning use of backing material set forth in paragraph (b)(4) of this section.) A billfold made of top grain cowhide except for partitions and stay which are made of plastic coated fabric but have the appearance of leather may be described as—

Top Grain Cowhide With Partitions and Stay Made of Non-leather Material, or
Top Grain Cowhide With Partitions and Stay Made of Plastic Coated Fabric.

(ii) Where a product is made principally of top grain leather and the only other parts thereof which have the appearance of leather are made of split leather, the product may be described as made of top grain leather except for the designated parts made of split leather when accompanied by disclosure [1] that such parts are made of split leather. For example: A brief case made of top grain cowhide except for frame covering, gussets and partitions which are made of split cowhide may be described as—

Top Grain Cowhide With Split Cowhide Frame Covering, Gussets and Partitions.

(8) *Ground, pulverized or shredded leather.* Prohibiting any representation directly or by implication that a material in an industry product is leather, if such material contains ground, pulverized or shredded leather and thus is not wholly the hide of an animal. This provision shall not be construed as preventing an accurate representation as to the ground, pulverized or shredded leather content of the material. However, if the material has the appearance of being leather it must be accompanied by disclosure [1] as is required by paragraph (b)(2) of this section. For example: A brief case made of a composition material consisting of shredded leather fibers held together with a rubber adhesive and coated with vinyl may be described as:

Composition Material Containing Shredded Leather Fibers, Rubber Adhesive and Vinyl Coating

(9) *Form of required disclosures under this section.* All disclosures required by provisions of this section shall appear in the form of a stamping on the product, or on a tag, label, or card attached thereto, and be affixed with such degree of permanence as to remain on or attached to the product until it is received by the consumer purchaser. All disclosures so required on industry products shall also appear in all advertising of such products irrespective of the media used whenever statements, representations or depictions appear in such advertising which in the absence of such disclosures serve to create a false impression that the products, or parts thereof, are of a certain kind of composition. The disclosures affixed to products and made in advertising must be of such conspicuousness and clarity as to be noted by purchasers and prospective purchasers casually inspecting the products or casually reading, or listening to, such advertising. A disclosure required in connection with any representation must be in close conjunction therewith. [Guide 2]

[44 FR 11190, Feb. 27, 1979; 44 FR 16004, Mar. 16, 1979]

§ 24.3 Deceptive practices as to aniline finish, graining, embossing and processing.

In the sale, offering for sale or distribution of industry products, it is an unfair trade practice to represent, directly or by implication:

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[1] See paragraph (b)(9) of this section.

(a) That any such product is colored, finished, or dyed with aniline dye when such is not true in fact; or

(b) That any such product or any part thereof is dyed, embossed, grained, processed, finished or stitched in a certain manner when such is not true in fact. [Guide 3]

§ 24.4 Deception as to hardware, frame or box.

In the sale, offering for sale or distribution of industry products, it is an unfair trade practice to represent, directly or by implication:

(a) That the hardware or any item thereof contained in an industry product is brass, solid brass, or some other designated material when such is not true in fact or when such hardware is only plated or coated with the material designated and the remaining metal therein is of a different kind; or

(b) That the box or frame of an industry product is made in whole or in part of a certain kind of material when such is not true in fact. [Guide 4]

§ 24.5 Misuse of the terms "waterproof," "dustproof," "warpproof," "scuffproof" and "scratchproof."

It is an unfair trade practice to:

(a) Use the term "Waterproof" as descriptive of an industry product or the material of which an industry product is made unless such product or material, whichever is so designated is impermeable to water and moisture.

(b) Use the term "Dustproof" as descriptive of an industry product unless such product is so constructed that when it is closed dust cannot enter the product.

(c) Use the term "Warpproof" as descriptive of an industry product or part thereof unless the product or part so designated is such that it cannot warp.

(d) Use the term: "Scuffproof" or "Scratchproof" as descriptive of an industry product unless the outside surface of the product is immune to scratches or scuff marks. [Guide 5]

PARTS 25-149—[RESERVED]

FINDING AIDS

A list of CFR titles, subtitles, chapters, subchapters and parts and an alphabetical list of agencies publishing in the CFR are included in the CFR Index and Finding Aids volume to the Code of Federal Regulations which is published separately and revised annually.

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Redesignation Table

At 41 FR 54483, December 14, 1976, as amended at 41 FR 54922, December 16, 1976, regulations formerly under Part 0—Standards of Conduct were redesignated and transferred to Part 5.

For the convenience of the user, the following table shows the relationship of the old CFR section numbers under Part 0 to the new CFR section numbers in Part 5.

SUBPART A—GENERAL PROVISIONS

Old section number	New section number
0.735-1	5.1
0.735-2	5.2
0.735-3	5.3
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0.735-5	5.5
0.735-6	5.6
0.735-7	5.7
0.735-8	5.8

SUBPART B—ETHICAL AND OTHER CONDUCT AND RESPONSIBILITIES OF EMPLOYEES

Old section number	New section number
0.735-10	5.10
0.735-11	5.11
0.735-12	5.12
0.735-13	5.13
0.735-14	5.14
0.735-15	5.15
0.735-16	5.16
0.735-17	5.17
0.735-18	5.18
0.735-19	5.19

SUBPART C—ETHICAL AND OTHER CONDUCT AND RESPONSIBILITIES OF SPECIAL GOVERNMENT EMPLOYEES

Old section number	New section number
0.735-21	5.21
0.735-22	5.22
0.735-23	5.23
0.735-24	5.24
0.735-25	5.25
0.735-26	5.26

SUBPART D—STATEMENTS OF EMPLOYMENT AND FINANCIAL INTERESTS

Old section number	New section number
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0.735-32	5.32
0.735-33	5.33
0.735-34	5.34
0.735-35	5.35
0.735-36	5.36
0.735-37	5.37
0.735-38	5.38
0.735-39	5.39
0.735-40	5.40
0.735-41	5.41
0.735-42	5.42

SUBPART E—STATUTORY DISQUALIFICATION AND PROVISION FOR EXEMPTIONS THERETO

Old section number	New section number
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0.735-52	5.52

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List of CFR Sections Affected

All changes in this volume of the Code of Federal Regulations which were made by documents published in the Federal Register since January 1, 1973, are enumerated in the following list. Entries indicate the nature of the changes affected. Page numbers refer to Federal Register pages. The user should consult the entries for chapters and parts as well as sections for revisions.

For the period before January 1, 1973, see the "List of CFR Sections Affected 1949-1963, and 1964-1972," published in three separate volumes.

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1.71	Amended	32438
1.72	Amended	32438
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4.7	(c) revised	35300
4.8	Revised	1730
	Effective date corrected	2210
4.9	Revised	1730
	Effective date corrected	2210
	(c)(3) revised	18545
4.10	Revised	1731
	Effective date corrected	2210
	(a)(5) revised	8644
4.11	Revised	1732
	Effective date corrected	2210
14	Heading revised	20820
14.9	Added	20820
	Corrected	21494
15.88	Removed	1733
15.103	Removed	28270
15.195	Removed	28270
15.346	Removed	28270
15.354	Removed	28270
15.356	Removed	28270
15.367	Removed	28270
15.379	Removed	28270
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15.418	Removed	28270
15.423	Removed	28270
15.428	Added	28270
15.429	Added	28270
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3.41 (a) revised.......34393
4.9 (b)(16) added.......26399
4.10 (a)(8) corrected.......4661
4.11 Revised.......10891
13.2100 Added.......28979
13.2100-10 Added.......28979
14.10 Added.......43297
15.483 Added.......1260
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15.584 Added.......3820
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13 Heading revised	761
13.533—13 533-70 (Subpart) Added	761
13.687—13.687-5(a) (Subpart) Added	57668
13.1852-20 Added	57668
14.11 Added	23845
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